Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

J. L. WILSON, ROY C. LEWELLEN, DON TRIMBLE AND E. DION WILSON, Counsel for the Plaintiff class represented by the Lake View School District No. 25, Phillips County, Arkansas, et. al.,

Petitioners

v.

MIKE HUCKABEE, Governor, et. el.

Respondents

On Petition For A Writ of Certiorari To The Supreme Court of Arkansas

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APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners

v.

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LAKE VIEW SCHOOL DISTRICT NO. 25 of Phillips County, Arkansas, *et al.*, *Appellants* v. Governor Mike HUCKABEE; Senator Mike Beebe, President Pro Tempore of the Senate; Representative Shane Broadway, Speaker of the House; State Auditor Gus Wingfield; State Treasurer Jimmie Lou Fisher; Director of the Arkansas Department of Education Raymond Simon; Arkansas State Board of Education Members Luke Gordy, William Fisher, Jonell Caldwell, Anita Yates, Lewis Thompson, Claiborne Deming, Richard Smith, Betty Pickett, Robert Hackler, and Shelby Hillman; and Director of the Arkansas Department of Finance and Administration Richard Barclay, *Appellees*; and Rogers School District No. 30 and Bentonville School District No. 6 of Benton County, and Little Rock School District of Pulaski County, *Intervenors/Appellees*

01-836

91 S.W.3d 472

Supreme Court of Arkansas
Opinion delivered November 21, 2002

Appeal from Pulaski Chancery Court; *Raymond Collins Kilgore*, Chancellor; affirmed in part; reversed in part; attorney's fees affirmed as modified; stay issued.

COUNSEL

E. Dion Wilson; Don Trimble; and *Lewellen & Associates,* for appellant class; and *Jack, Lyon & Jones, P.A.,* by: *Eugene G. Sayre,* special attorney for appellant class.

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Dudley & Compton, by: *Cathleen V. Compton*, for *amicus curiae* Arkansas Policy Foundation.

Lavey & Burnett, by: *John L. Burnett*, for *amicus curiae* Arkansas Advocates for Children and Families.

Barrett & Deacon, A Professional Association, by: *D.P. Marshall Jr.*, *Leigh M. Chiles*, and *Brian A. Vandiver*, for *amicus curiae* Arkansas State Chamber of Commerce, Inc., and Associated Industries of Arkansas, Inc.

OPINION

LEAD
ROBERT L. BROWN, Justice.

This is an appeal from the final order of the Pulaski County Chancery Court entered May 25, 2001, which concluded that the current school-funding system is unconstitutional under the Education Article (Article 14, § 1) and the Equality provisions (Article 2, §§ 2, 3, and 18) of the Arkansas Constitution.[1] The trial court also awarded counsel for Lake View School District No. 25 and the resulting class total attorneys' fees in the amount of $9,338,035. We affirm the trial court's order regarding the unconstitutionality of the public school-funding system but reverse its finding relative to excess debt service as a credit against each school district's uniform rate of 25 mills. We affirm the grant of attorneys' fees but modify the amount to an award of $3,088,050, plus costs in the amount of $309,000.

This case has been in litigation for more than ten years.

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[1] Amendment 80 to the Arkansas Constitution which became effective July 1, 2001, designated all courts as "circuit courts."

On August 19, 1992, Lake View School District No. 25, school district officials, and certain individuals residing in Phillips County (hereinafter Lake View) sued the Governor of the State, the State Treasurer, the Speaker of the House of Representatives, the President of the Senate, Officers of the State Department of Education, and the State Board of Education (hereinafter referred to collectively as the State).[2] The complaint prayed for (1) a declaration that the school-funding system was unconstitutional under both the United States Constitution and the Arkansas Constitution, and (2) an injunction against implementing the unconstitutional system.

On November 9, 1994, then-chancery judge Annabelle Clinton Imber found that the school-funding system did not violate the United States Constitution, but that it did violate the Education Article (Article 14, § 1) and the Equality provisions (Article 2, §§ 2, 3, and 18) of the Arkansas Constitution. In December 1994, Judge Imber modified her November order slightly with two additional orders. For purposes of this opinion, the three orders will be referred to as the 1994 order. The chancery judge stayed the effect of her order for two years to enable the Arkansas General Assembly to enact a constitutional school-funding system in accordance with her opinion. In 1995, the chancery judge denied Lake View counsel attorneys' fees. On March 11, 1996, this court dismissed an appeal by the State contesting the 1994 order based on the fact that the order was not final, since the two-year stay was still in effect. *See Tucker v. Lake View School Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530 (1996) (*Lake View I*). In *Lake View I*, we expressly referred to the fact that Lake View's rights in the matter had not been concluded and that further hearings before the trial court were necessary before the trial court's order could be placed into execution. At the expiration of the two-year stay near the end of calendar year 1996, neither Lake View nor the State appealed from the trial court's 1994 order.

During its General Session in 1995, the Arkansas General Assembly enacted several acts for the purpose of establishing a new school-funding system. Specifically, Acts

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[2] The style of this case reflects the appellees as identified in the State's notice of appeal.

916 and 917 were enacted, as well as Act 1194, which appropriated over $1.3 billion in school funding for the first year of the next biennium and more than $1.4 billion for the second year of the biennium.[3]

On August 22, 1996, following Lake View's third and fourth amended complaints, the trial court certified the Lake View class, as requested by Lake View, which included all school districts in the state, students and parents of students in all school districts, school board members of all school districts, and school district taxpayers who support the system. On November 5, 1996, the people of Arkansas approved by majority vote Amendment 74 to the Arkansas Constitution which fixed a uniform rate of 25 mills for each school district as the *ad valorem* property tax rate for the maintenance and operation of the public schools and permitted increases in the uniform millage rate as "variances" to enhance public education.

At its next General Session, the General Assembly enacted new legislation providing for public school financing, including Act 1307 of 1997, codified in part at Ark. Code Ann. §§ 6-20-302 *et seq.* (Repl. 1999). Act 1307 repealed portions of Act 917 of 1995 but, in addition, made legislative findings relating to educational adequacy, defined a "uniform rate of tax" under Amendment 74, defined terms used in the school-funding formula, and provided incentives for school districts to encourage millage assessments to enhance public education. The General Assembly also enacted Act 1108 of 1997, now codified at Ark. Code Ann. §§ 6-15-1001 through 1011 (Repl. 1999), which set educational goals, and Act 1361 of 1997, which appropriated funds totaling over $1.5 billion for each year of the next biennium for grants and aid to the state's school districts.

In 1998, there was an effort by Lake View and the State to settle the lawsuit. The trial court, however, declined to

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[3] This court subsequently held that Act 916 of 1995 was unconstitutionally adopted due to an alteration of the bill, which ran counter to its original purpose as stated in the bill's title. *See Barclay v. Melton*, 339 Ark. 362, 5 S.W.3d 457 (1999).

approve the settlement.[4] On August 17, 1998, the trial court dismissed Lake View's fourth amended complaint on the grounds that with Amendment 74 and the 1995 and 1996 legislative acts, a new standard for public school funding had been implemented. Legislative acts are presumed to be constitutional, the trial court observed, and, thus, the fourth amended complaint and show-cause petition for why the State should not be held in contempt of the 1994 order were moot. No attorneys' fees were granted to Lake View counsel.

The 1998 Dismissal Order was appealed to this court, and we reversed. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000) (*Lake View II*). In *Lake View II*, we remanded the matter for a compliance trial to be held regarding the constitutionality of the post-1994 legislative acts and for a determination of attorneys' fees. *See id.*[5]

In its 1999 General Session, the General Assembly appropriated funds for public education totaling more than $1.6 billion for the first year of the biennium and more than $1.7 billion for the second year. *See* Act 1392 of 1999. The General Assembly also enacted Act 999 of 1999, amending Ark. Code Ann. §§ 6-15-401 through 407, 6-15-419 through 422, and 6-15-1003 (Repl. 1999), and establishing the Arkansas Comprehensive Testing Assessment and Accountability Program (ACTAAP) to assess and evaluate academic progress and performance in the public schools with an emphasis on reading and writing, literacy, and mathematics from the earliest grades.

Prior to the compliance trial in 2000, a total of 144 school districts sought to intervene and align themselves with the State's position that the post-1994 legislation had cured the constitutional deficiencies. The trial court denied the motions. In September and October of 2000, the trial court conducted

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[4] In January 1997, Judge Imber assumed her role as Associate Justice of the Arkansas Supreme Court. Chancellor Collins Kilgore was subsequently assigned the case.

[5] For a complete history of this case through March 2, 2001, refer to *Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000) (*Lake View II*).

the compliance trial over nineteen days. Thirty-six witnesses testified, including some for a second time. One hundred and eighty-seven exhibits were introduced and considered. The resulting appellate record was ninety-nine volumes and totaled 20,878 pages. On September 19, 2000, Lake View filed a revised petition for an award of attorneys fees in the amount of $32.5 million and for litigation costs of at least $200,000. On September 22, 2000, the Rogers and Bentonville School Districts filed a cross-complaint against the State in which they contended that the school-funding system was constitutionally inadequate.

Judge Kilgore entered his final order on May 25, 2001, as already referenced, in which he declared the current school-funding system to be unconstitutional on the twin grounds of inadequacy under the Education Article and inequality under the Equality provisions of the Arkansas Constitution. *See* Ark. Const. art. 14, § 1, art. 2, §§ 2, 3, 18. He further awarded Lake View's counsel attorneys' fees of $9,338,035 but denied their request for costs.

I. Posture of the Parties

Though Lake View prevailed on the core issue of the unconstitutionality of the post-1994 legislative acts, it filed the first notice of appeal on June 22, 2001, and raised issues including Judge Kilgore's failure to deem Judge Imber's 1994 order law of the case, the failure to classify desegregation money as state aid, the failure of the trial court to award adequate attorneys' fees, the failure of the trial court to hold the State in contempt of court for failure to comply with the 1994 order, and the failure of the trial court to order specific remedies.

Little more than one hour later on June 22, 2001, the State appealed the 2001 order on both the constitutionality points and the award of attorneys' fees. Over the ensuing year, the parties jockeyed for position on various issues such as who was the true appellant and who was the cross-appellant, who would prepare the abstract of testimony, and whether a separate brief on attorneys' fees was warranted. This court concluded that Lake View was the appellant and the State was the cross-appellant, that the State could reabstract the testimony and record, and that Lake View was entitled to a

brief on the merits of the case as well as a brief on attorneys' fees. The Rogers and Bentonville school districts were designated as Intervenors/Appellees, as was the Little Rock School District. The three school districts intervened in support of the trial court's conclusion that the school-funding system was unconstitutional on adequacy and inequality grounds. No other school districts intervened on appeal. The rulings and orders made by this court over the past year were memorialized in an opinion of this court. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 349 Ark. 116, 76 S.W.3d 250 (2002) (*per curiam*) (*Lake View III*). This opinion included reference to the filing of *amicus curiae* briefs. With the permission of this court, the following groups filed *amicus curiae* briefs in this matter: the Arkansas Education Association (in support of the trial court's order); the Arkansas State Chamber of Commerce, Inc. and the Associated Industries of Arkansas, Inc. (in support of the trial court's order); Arkansas Advocates for Children and Families (in support of the trial court's order); the Arkansas Public Policy Panel and the Rural School and Community Trust (in support of the trial court's order); and the Arkansas Policy Foundation (in support of the State's position).

II. School-Funding System

At the time of the 2001 final order, there were 310 school districts in Arkansas. In *Lake View II*, this court described the school-funding system as it existed in 1994 as follows:

> In 1994, school districts received approximately thirty percent of their revenue from local funds, sixty percent from state aid, and ten percent from federal funds.

Lake View II, 340 Ark. at 484, 10 S.W.3d at 894.

In his 2001 final order, Judge Kilgore presented what he described as a "simplified explanation" of the school-funding formula, which no party has contested. According to the trial court, under the formula, the State Department of Education first calculates a "base level revenue" which is determined by adding all state and local money available to all public schools throughout the state and dividing that figure by the average daily membership of all students statewide. The

base level revenue per student according to the 2001 order was $4535 for the 1996-97 school year. The State then calculates the local resource rate for students in each individual school district. This calculation is made by first determining the assessed value of personal, real, and utility property within the school district, and then multiplying that figure by 98 percent. That figure is multiplied by the uniform rate of 25 mills pursuant to Amendment 74. The resulting number is then divided by the average daily membership of students in that school district which results in the local resource rate. If the local resource rate is less than the base level revenue per student ($4535 in 1996-97), the Department of Education will make up the difference through its Equalization Aid so that all school districts in the state will receive equal revenues per student under the formula.[6]

The 2001 school-funding formula is essentially the same as what was in place in 1994, which Judge Imber described in her order. The principal differences are that in 1994 the Department of Education used a "charge" of 26.7 mills rather than the uniform rate of 25 mills pursuant to Amendment 74, which was approved two years later, and the average daily membership was "weighted" for fictional students to provide school districts with funds for students with special needs. The 1994 "weighted" system changed in 1995 with Act 1194, in which the General Assembly began providing grants and aid for special needs through specific categories. In 1994 and in 2001, based upon the two court orders, the State sought to achieve equal opportunity for Arkansas students by equalizing per-student revenues statewide according to the base level rate.

In 1994, as in 2001, individual school districts could pass additional millages assessed against district property to enhance local education, whether for building programs or for maintenance and operation. Indeed, Amendment 74 specifically contemplates variations in millages among school districts for maintenance and operation:

> (a) The General Assembly shall provide

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[6] State statutes refer to "base local revenue per student" rather than "base level revenue" and "local revenue per student" rather than "local resource rate." *See* Ark. Code Ann. § 6-20-303(5) & (15) (Repl. 1999).

> for the support of common schools by general law. In order to provide quality education, it is the goal of this state to provide a fair system for the distribution of funds. It is recognized that, in providing such a system, some funding variations may be necessary. The primary reason for allowing such variations is to allow school districts, to the extent permissible, to raise additional funds to enhance the educational system within the school district. It is further recognized that funding variations or restrictions thereon may be necessary in order to comply with, or due to, other provisions of this Constitution, the United States Constitution, state or federal laws, or court orders.

The State provides other funding and guarantees to school districts as well. For example, it provides what the trial court described as "additional base funding," which guarantees that all school districts will have a minimum state and local revenue per average daily membership that is at least eighty percent of the state and local revenue available for a school district at the ninety-fifth percentile.[7] The State also has programs to assist school districts with capital improvements, although the Growth Facilities Funding program for new buildings and equipment was phased out in 2001. What remains is General Facilities Funding for purchases of buses, computers, facility repairs, and maintenance, and Debt Service Funding to assist school districts in paying their debt service incurred for capital improvements. The trial court concluded that these programs for capital improvements were inadequate:

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[7] The school district at the ninety-fifth percentile is determined pursuant to Ark. Code Ann. § 6-20-303(17) (Repl. 1999), which provides:

> "Local school district at the ninety-fifth percentile" means, when ranking school districts in descending order by the total state and local revenue per average daily membership, a district which falls at the ninety-fifth percentile of the total number of pupils in attendance in the schools of this state, as described by 34 C.F.R. § 222.63 (1994)[.]

> Even with these three programs, some districts cannot afford to build new buildings, complete necessary repairs or buy buses. Either the money is not available through General Facilities or Growth Facilities Funding or the district is too poor to incur sufficient debt to finance new construction and take advantage of the Debt Service Funding Supplement.

The trial court further alluded to three formulas commonly used to determine whether disparities in funding among the school districts exist. In doing so, the court drew a distinction between *revenues* provided to the school districts by means of local and state funding and *expenditures* made by the school districts for the benefit of their students:

> 20. The purpose of the three formulas (Federal Range Ratio, Coefficient of Variation and GINI Index of Inequality) is to aid in analyzing disparities in funding for schools, school districts and students. But the question, as framed by the Supreme Court, is do unconstitutional disparities exist? Does the state fulfill its constitutional duty to provide each of its children an education adequate to give the child the opportunity to realize his potential, enrich his life and be an asset to his community? The formulas do not provide an exclusive way to answer the questions. (Greene, Def. Ex. 68, fn 1)
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> 21. Using expenditures in the calculation of the Federal Range Ratio, this court finds that there is more than a 25% difference between the 5th and the 95th percentile in amount spent per pupil which is not in compliance with the 1994 Order. However, using revenues, the State is within the 25% range differential. Using expenditures in the Coefficient of Variation, the State is not in compliance. Using expenditures in the calculation of the GINI Index of Inequality, the State is in compliance.

Finally, federal funds are distributed to the school districts for special-need students. These funds are dispersed outside of the school-funding formula and are not subject to the discretion of the school districts.

III. Standard of Review

Our standard of review in chancery cases has been often stated:

> We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancery court unless it is clearly erroneous. *Moon v. Marquez*, 338 Ark. 636, 999 S.W.2d 678 (1999); *Office of Child Support Enforcement v. Eagle*, 336 Ark. 51, 983 S.W.2d 429 (1999). A finding of fact by the chancery court is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999); *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). It is this court's duty to reverse if its own review of the record is in marked disagreement with the chancery court's findings. *Dopp v. Sugarloaf Mining Co.*, 288 Ark. 18, 702 S.W.2d 393 (1986) (citing *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); *Walt Bennett Ford v. Pulaski County Special Sch. Dist.*, 274 Ark. 208, 624 S.W.2d 426 (1981)).

State Office of Child Support Enforcem't v. Willis, 347 Ark. 6, 11-12, 59 S.W.3d 438, 442 (2001). *See also Wisener v. Burns*, 345 Ark. 84, 44 S.W.3d 289 (2001).

We initially must address which order we are reviewing. Are we reviewing Judge Imber's 1994 order, Judge Kilgore's 2001 order, both orders, or some combination of the two? We are convinced that what is on appeal is Judge Kilgore's 2001 order in which he found the post-1994 legislative acts to be unconstitutional. In *Lake View II*, we referred to Judge Imber's November 1996 orders, where she

found that the 1995 legislation constituted new facts and that law of the case would not apply to her 1994 order. We then remanded this case for a compliance trial on whether the post-1994 legislation and Amendment 74 had corrected the constitutional deficiencies. That is the task which Judge Kilgore undertook—an examination of the new legislative acts in light of constitutional mandates. We further note on this point that Judge Imber's 1994 order was never appealed after it reached finality, but that the State and Lake View specifically appealed from Judge Kilgore's order. Accordingly, it is the 2001 order that is before us for review.

With this in mind, we turn to the merits of this appeal. Because the State's points on appeal go to the heart of the matter, we will consider them first.

IV. Justiciability

The State devotes a substantial portion of its opening brief to its argument that the constitutionality of the school-funding system is a nonjusticiable issue for the courts. In the State's view, the courts unduly interfere and even usurp legislative and executive branch functions when they declare school-funding systems unconstitutional. This, the State maintains, equates to a mandate to the General Assembly to appropriate more funds for the public schools which violates the separation-of-powers clauses in the Arkansas Constitution. *See* Ark. Const. art. 4, §§ 1, 2. Moreover, the State contends, citing *Baker v. Carr*, 369 U.S. 186 (1962), that the funding of our public schools is a political question involving public policy and the interplay between the State and local school districts, which is best left to the General Assembly to resolve. In support of its nonjusticiability argument, the State directs our attention to five cases from other jurisdictions. *See James v. Alabama Coalition for Equity, Inc.*, ___ So. 2d ___ (Ala. May 31, 2002) (not yet released for publication); *Marrero v. Commonwealth of Pennsylvania*, 559 Pa. 14, 739 A.2d 110 (1999); *Coalition for Adequacy & Fairness in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 672 N.E.2d 1178 (1996); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995). As a corollary to this argument, the State urges that the courts should avoid getting "mired down" in endless litigation in an effort to supervise the public schools.

The State's nonjusticiability point appears to have been raised for the first time in this appeal. The State implicitly claims that a violation of separation of powers is a question of subject-matter jurisdiction, which, of course, can be raised at any time or even by this court on its own motion. *See Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997). Regardless of this argument, we believe that the issue of nonjusticiability was laid to rest in a previous school-funding case in which we discussed the distinctive roles of the legislative and judicial branches. *See DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983). The State never discusses *DuPree* in connection with this point, but in that case, we quoted favorably from a seminal school-funding opinion by the California Supreme Court:

> The dispositive answer to the above arguments is simply that this court is not now engaged in—nor is it about to undertake—the "search for tax equity" which defendants prefigure. As defendants themselves recognize, it is the Legislature which by virtue of institutional competency as well as constitutional function is assigned that difficult and perilous quest. Our task is much more narrowly defined: it is to determine whether the trial court committed prejudicial legal error in determining whether the state school financing system at issue before it was violative of our state constitutional provisions guaranteeing equal protection of the laws insofar as it denies equal educational opportunity to the public school students of this state. If we determine that no such error occurred, we must affirm the trial court's judgment, leaving the matter of achieving a constitutional system to the body equipped and designed to perform that function.

DuPree, 279 Ark. at 349-50, 651 S.W.2d at 95 (quoting *Serrano v. Priest*, 18 Cal. 3d 728, 759, n. 38, 557 P.2d 929, 946, 135 Cal. Rptr. 345, 362 (1976) (internal citations omitted)). We continue to adhere to our opinion in *DuPree* and its discussion of the respective roles of the legislative and judicial branches relative to school funding. Clearly, the roles are different, and we conclude that the two branches do not operate at cross

purposes in the school-funding context.

We further observe that the Education Article in the Arkansas Constitution designates the *State* as the entity to maintain a general, suitable, and efficient system of free public schools:

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the *State* shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.

Ark. Const., art. 14, § 1 (emphasis added). That is not the case in the state constitutions in four of the five cases cited by the State as authority for its nonjusticiability position; rather, in those state constitutions it is incumbent upon the *General Assembly* to provide, maintain, or promote the public schools. *See James v. Alabama Coalition for Equity, Inc., supra* ("The legislature may by law provide for or authorize the establishment and operation of schools. . . ."); *Marrero v. Commonwealth of Pennsylvania, supra* ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education. . . ."); *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles, supra* ("Adequate provision shall be made by law for a uniform system of free public schools. . . ."); *City of Pawtucket v. Sundlun, supra* ("[I]t shall be the duty of the general assembly to promote public schools. . . .").

As a historical footnote, our own Education Article in our current state constitution was adopted in 1874 and amended by Amendment 53 in 1968. The four preceding constitutions in Arkansas all stated that the General Assembly would provide for public education. *See* Ark. Const. of 1836, art. VII; Ark. Const. of 1861, art. VII, § 1; Ark. Const. of 1864, art. VIII; Ark. Const. of 1868, art. IX, § 1. In 1874, however, that duty was expressly shifted to the State, which signaled, in our judgment, a deliberate change. The people of this state unquestionably wanted all departments of state government to be responsible for providing a general, suitable, and efficient system of public education to the children of this

state.

The State's argument appears to be that not only are legislative acts presumed to be constitutional, *see, e.g., Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999), but that they are *per se* constitutional and not subject to judicial review. Thus, the State's position is that the judiciary has no role in examining school funding in light of the Arkansas Constitution, though the annual appropriation constitutes almost one half of the State's total budget and affects the vast majority of school-aged children in this State.

We reject the State's argument. This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: "[T]he judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches." Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 870 (1960).

> Early on, this court announced:
> The people of the State, in the rightful exercise of their sovereign powers, ordained and established the constitution; and the only duty devolved upon this court is to expound and interpret it.

State v. Floyd, 9 Ark. 302, 315 (1849). And then in 1878, we said:

> [W]e claim it to be a right and a duty to interpret our own Constitution and laws; and in local concerns, so long as they do not conflict with the Constitution and laws of the United States, they are supreme . . . .

Graham v. Parham, 32 Ark. 676, 684 (1878).

The Supreme Court of Kentucky has emphasized the need for judicial review in school-funding matters. The language of that court summarizes our position on the matter,

both eloquently and forcefully, and, we adopt it:

> Before proceeding . . . to a definition of "efficient" we must address a point made by the appellants with respect to our authority to enter this fray and to "stick our judicial noses" into what is argued to be strictly the General Assembly's business.
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> . . . .
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> . . . [In this case] we are asked—based solely on the evidence in the record before us—if the present system of common schools in Kentucky is "efficient" in the constitutional sense. It is our sworn duty, to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary.
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> . . . .
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> . . . To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.
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> . . . .
>
> The judiciary has the ultimate power, and the duty, to apply, interpret, define, and construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action services as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.

Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 208-10 (Ky. 1989) (emphasis in original). For these reasons, we conclude the matter before us is justiciable.

V. Adequacy

We turn then to a review of the trial court's declaration that the State's school-funding system violates Article 14, § 1. To reiterate, § 1 of the Education Article reads:

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it. [As amended by Const. Amend. 53.]

The State first contends that this court did not remand this case in *Lake View II* for a compliance trial on adequacy under Article 14, but only for a trial on equality under Article 2, §§ 2, 3, and 18. The State is incorrect. In *Lake View II*, this court remanded the case to the trial court for a determination of whether the post-1994 legislation had satisfied the two constitutional deficiencies underscored by Judge Imber in her 1994 order. Judge Imber had concluded that the school-funding system failed as inadequate under Article 14 and inequitable under Article 2 of the Arkansas Constitution. Indeed, Lake View had filed a separate lawsuit contesting school funding as constitutionally inadequate, and the trial court properly approved a nonsuit of that action by Lake View because adequacy issues were already before the court in the compliance trial. The State's argument is meritless.

a. Adequacy Study.

The keystone of the State's adequacy argument is that an adequate education in Arkansas is impossible to define. We observe that on this point, the Department of Education and the General Assembly may be at odds. In her 1994 order, Judge Imber stated that there had been no studies on the per-student cost to provide "a general, suitable and efficient" educational opportunity to Arkansas schoolchildren. In 1995, the Arkansas General Assembly seized upon that theme and called for an adequacy study:

> (c) The State Board of Education shall devise a process for involving teachers, school administrators, school boards, and parents in the definition of an "adequate" education for Arkansas students.
>
> (d) The State Board shall seek public guidance in defining an adequate education and shall submit proposed legislation defining adequacy to the Joint Interim Committee on Education prior to December 31, 1996.

Act 917 of 1995, § 6(c-d).

Despite this directive from the General Assembly, nothing has been done by the Department of Education, and seven years have passed. Judge Kilgore echoed this in his 2001 order:

> Pursuant to Act 917 of 1995, and in order that an amount of funding for an education system based on need and not on the amount available but on the amount necessary to provide an adequate educational system, the court concludes an adequacy study is necessary and must be conducted forthwith.

Stated simply, the fact that the Department of Education has refused to prepare an adequacy study is extremely troublesome and frustrating to this court, as it must be to the General Assembly. Indeed, the General Assembly in two 1997 Acts partially addressed what an adequate education in

Arkansas would entail:

> (c) The General Assembly finds that a suitable and efficient system of public education should:
>
> . . .
>
> (4) Assure that:
>
> (A) All students graduating from high school are able to demonstrate a defined minimum level of competence in:
>
> (i) English communications, oral, reading, and writing;
>
> (ii) Mathematical skills; and
>
> (iii) Science and social studies disciplines[.]

Act 1307 of 1997, § 1, codified at Ark. Code Ann. § 6-20-302(c)(4)(A) (Repl. 1999).

> . . .
>
> (a) Arkansas public school students will achieve competency in the basic core of knowledge and skills.
>
> (1) Students will meet required standards in academic areas of the curriculum that will serve as a basis for students to pursue immediate and lifelong educational and employment opportunities.
>
> (2) Students will achieve competency in language arts (writing, spelling, speaking, listening, and reading), math (computation, measurement, probability and statistics, problem solving, basic algebra, data analysis, and geometry concepts), science (physical and life science knowledge, and scientific problem

solving), and social studies (history, geography, economics, and civic education).

(b) Arkansas public school students will apply practical knowledge and skills.

(1) Students will meet required academic standards in those areas that will better prepare them for lifelong career opportunities.

(2) Students will achieve competency at the local level in computer science and other technologies, practical economic and consumer skills, and be offered courses in vocational-preparation skills.

(c) Arkansas public school students will demonstrate achievement.

(1) Students will participate in the state assessments in the basic core of knowledge and skills as defined by the State Department of Education in the Arkansas Comprehensive Testing and Assessment Program.

(2) The students' numerical and percentage scores on the High School Proficiency Examination will be recorded on their transcripts, and the examination will be a part of the local school grading system in a way to be determined by the local school district.

(3) Each local school district shall report to the State Department of Education how it will incorporate the assessment system required by this subsection into the district's grading system.

Act 1108 of 1997, § 3, codified in slightly different language at Ark. Code Ann. § 6-15-1003(a), (b), (c) (Repl. 1999). In short, the General Assembly is well on the way to defining adequacy while the Department of Education, from all indications, has

been recalcitrant.

Without the benefit of an adequacy standard developed by the Department of Education, both Judge Imber and Judge Kilgore looked to the case of *Rose v. Council for Better Education, Inc., supra,* for a definition of "efficient" education:

> We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Rose, 790 S.W.2d at 212. Many of the "Rose standards," as we will call them, were adopted by our General Assembly with Act 1108 and Act 1307 in 1997, as has already been set forth in this opinion.

In addition to the State's argument that an adequate education is incapable of definition, it further contends that there is no correlation between enhanced school funding and better student performance. For example, it argues that more money has been spent on education since the *DuPree* decision

in 1983, and student performance has not appreciably improved. The State points to the ACTAPP program for assessing and evaluating student performance in English and mathematical skills as a positive step the State has recently taken. The State also fiercely contends that the Arkansas Constitution does not require pre-school programs such as those, it contends, were mandated by Judge Kilgore.

b. Educational Deficiencies.

What the State does not address are Arkansas' abysmal rankings in certain key areas respecting education. What follows is a compendium of the trial court's findings, which the State does not contest:

I. Arkansas ranks fiftieth among the states in per capita state and local government expenditures for elementary and secondary education.

II. Arkansas students scored several tenths below the national average in a standardized test (ACT) between 1990 and 1999.

III. Arkansas ranks lower than the national average for the percentage of adults twenty-five years and older who have graduated from high school.

IV. Arkansas ranks forty-ninth in the country for the percentage of the population age twenty-five or older with a Bachelors degree or higher.

V. Arkansas is tied for fiftieth in the country in percentage of adults with graduate degrees.

VI. Arkansas' fourth- and eighth-grade students are below the national average for proficiency in math, reading, science and writing.

VII. On the first ACTAPP test, only forty-four percent of the fourth-grade students tested were proficient in reading and only thirty-four percent of those tested were proficient in math.

VIII. Arkansas' per pupil revenue under the school-funding formula in school year 1996-97 was $4,535, while the national average was $5,923.

IX. Arkansas ranks between forty-eighth and fiftieth among the states in teacher pay.

Results of the State's own Benchmark testing for eighth-grade students in April 2000 showed that only sixteen percent were proficient or above in math statewide, and in the Little Rock School District only nine percent were proficient or above. Arkansas has no funding for the remediation of individual students and no funding to train teachers for remediation after ACTAPP evaluations.

With respect to Arkansas high school students entering state universities, fifty-eight percent needed remediation in either English or math. For the Rogers High School students entering a university (including some students with 3.0 grade averages), forty-four percent needed remediation in either English or math.

Judge Kilgore concluded in his 2001 order that the "State has a remarkably serious problem with student performance." We agree.

Arkansas' entry level for teacher salaries is last when compared to our eight bordering states, and Arkansas spends twenty percent less than the national average for teachers across the board. The entry level salary for Arkansas school districts bordering Memphis, Tennessee, was about $5,695 less than that offered in Memphis school districts, and for more experienced teachers the differential was almost $6,000. A similar disparity exists for beginning salaries between school districts in Texarkana, Arkansas, and Texarkana, Texas. Arkansas school districts pay about $4,000 less than those in

Texas.

Serious disparities also exist in teacher salaries among school districts within the State of Arkansas. One example given by the trial court was the science teacher with two masters degrees and forty-one years' teaching experience receiving a salary of $31,500 in the Lake View School District, while a teacher with comparable degrees and experience received $43,524 in the Fort Smith School District.

Poor school districts with the most ill-prepared students are losing their teachers due to low pay. Both recruitment and retention of teachers are difficult in those districts. The Bentonville School District, which is not impoverished, will lose fifteen percent of its teachers in the next three years due to retirement. Low pay and competition from the private sector present real obstacles to teacher recruitment in that district.

Dr. Raymond Simon, Director of the Department of Education, had this to say about the salary crisis:

> MR. HELLER: And I wanted to ask you what else you -- you think we should be doing in Arkansas to address students' above and beyond ACTAPP?
>
> DR. SIMON: I think we're facing -- I think the most critical thing we need to address now is the issue of teacher's salaries. ACTAAP, Smart Start, Smart Step, all of that depends primarily on the classroom teacher to function. And we are beginning to see a crisis now in our State of quality teachers, some retiring. My generation has had all of this they want in many cases, and they're -- they're retiring.
>
> . . . .
>
> MR. MATTHEWS: That's right. Okay. We're getting there. Track with me. In order to implement ACTAPP, you've got to have good teachers?
>
> DR. SIMON: Yes.

MR. MATTHEWS: In order to have good teachers, we've got to have more --

DR. SIMON: Money.

MR. MATTHEWS: Money.

DR. SIMON: For teachers' salaries.

MR. MATTHEWS: And until we have more money for teachers' salaries, we jeopardize the efficiency, the suitability, and the quality of the ACTAPP program, which you and others have implemented. Isn't that true?

DR. SIMON: That's correct, yes, sir.

In short, the Benchmark testing and the ACTAAP program which represent the paramount initiatives by the State to correct the course of educational deficiencies in Arkansas are dependent on quality teachers. And, according to the Director of the Department, quality teachers is an area where we have a crisis.

Testing, rankings, and teacher salaries do not tell the whole story. According to the uncontested findings of the trial court, in the Lake View School District, which is undeniably a poor school district, ninety-four percent of the students are on free or reduced school lunches. That school district has one uncertified mathematics teacher who teaches all high school mathematics courses. He is paid $10,000 a year as a substitute teacher and works a second job as a school bus driver where he earns $5,000 a year. He has an insufficient number of calculators for his trigonometry class, too few electrical outlets, no compasses and one chalkboard, a computer lacking software and a printer that does not work, an inadequate supply of paper, and a duplicating machine that is overworked. Lake View's basketball team does not have a complete set of uniforms, while its band has no uniforms at all. The college remediation rate for Lake View students is 100 percent.

The Holly Grove School District has only a basic curriculum and no advanced courses or programs. The

starting salary for its teachers is $21,000. Science lab equipment, computers, the bus fleet, and the heating and air conditioning systems need replacing. The buildings have leaking roofs and restrooms in need of repair. Because millage increases are difficult to win in the school district, Holly Grove must borrow against next year's revenues to repair a falling library roof and leaking gas line.

The Barton Elementary School in Phillips County has two bathrooms with four stalls for over one hundred students.

Lee County schools do not have advanced placement courses and suffer also from little or no science lab equipment, school buildings in need of repair, school buses that fail to meet state standards, and only thirty computers for six hundred students. Some buildings have asbestos problems and little or no heating or air conditioning.

These are just a few examples of deficiencies in buildings, equipment, and supplies that plague the State's school districts. School districts experiencing fast-growing student populations such as Rogers and Bentonville in Northwest Arkansas need additional buildings. Buildings in disrepair are rampant in Eastern Arkansas. And qualification for debt-service-funding supplements from the State depends on how much debt can be incurred by the school districts. Poorer districts with deteriorating physical plants are unable to incur much debt.

The Rogers School District has mushroomed by 4,300 students in the last decade. Since 1987, the enrollment in the Bentonville School District has increased 83.57 percent. About $432 of the revenue available per student in Rogers goes to debt. With the influx of the Latino population, an English-as-a-second-language program is a critical need. In 1991, eighty-four students were enrolled in the program. In 2000, there were 2,615 students enrolled. Rogers received $743,000 for the program from the State and spent $1,013,000.

In response to poor student performance, the State instituted academic distress programs in 1995 for school districts not meeting State Standards of Accreditation. *See* Ark. Code Ann. §§ 6-20-1601 through 6-20-1610 (Repl. 1999). Deficient test scores trigger Phase I, which requires the school

district to submit an improvement plan to the Department of Education; then Phase II, where the Department prepares the improvement plan; and finally Phase III, where the Department may mandate consolidation or a take-over of the district. Of the twelve school districts on the academic distress list at the time of the 2001 order, all were classified as poor.

c. Constitutional History.

We return then to our starting point and that is what Article 14, § 1, of the Arkansas Constitution requires of the State for education:

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.

Education has been a constitutional focus and mandate since the founding of our state. The framers of the first Arkansas constitution adopted the following Education Clause in 1836:

> Knowledge and learning generally diffused through a community being essential to the preservation of a free government, and diffusing the opportunities and advantages of education through the various parts of the State being highly conducive to this end, it shall be the duty of the General Assembly to provide by law for the improvement of such lands as are, or hereafter may be, granted by the United States to this State for the use of schools, and to apply any funds which may be raised from such lands, or from any other source, to the accomplishment of the object for which they are, or may be, intended. The General Assembly shall from time to time pass such laws as shall be calculated to encourage intellectual, scientific and agricultural improvement by allowing rewards and

> immunities for the promotion and improvement of arts, science, commerce, manufactures and natural history, and countenance and encourage the principles of humanity, industry and morality.

Ark. Const. of 1836, art. VII., *reprinted in* Ark. Code Ann. Constitutions 497 (1987). The 1836 Education Article embodied two fundamental ideas: the inherent value of education in creating a virtuous citizen and the crucial role of an educated citizenry in a functioning democracy.

The Secessionist Constitution of 1861 contained a truncated Education Article:

> The General Assembly shall apply any and all funds which may be raised for the purpose of education, to the accomplishment of the object for which they may be raised; and from time to time, pass such laws as shall be calculated to encourage intellectual, scientific and agricultural improvement, by allowing rewards and immunities for the promotion and improvement of art, science, commerce, manufactures, and natural history; and countenance and encourage the principles of humanity, industry and morality.

Ark. Const. of 1861, art. VII, § 1, *reprinted in* Ark. Code Ann. Constitutions 520 (1987).

The 1864 Constitution reverted to the language used in the 1836 Constitution. *See* Ark. Const. of 1864, art. VIII, § 1, *reprinted in* Ark. Code Ann. Constitutions, at 543. The Reconstruction Constitution in 1868 contained an Education Article that mandated a common school system, provided for the distribution of school funds, created a public officer responsible for the school system, and detailed how a common fund for the school system should be created and financed. The relevant language read:

> A general diffusion of knowledge and intelligence among all classes being essential to the preservation of the rights and liberties of

> the people, the General Assembly shall establish and maintain a system of free schools, for the gratuitous instruction of all persons in this State between the ages of five and twenty-one years, and the funds appropriated for the support of common schools shall be distributed to the several counties in proportion to the number of children and youths therein . . . .

Ark. Const. of 1868, art. IX, § 1, *reprinted in* Ark. Code Ann. Constitutions, at 567.

Following reconstruction, the 1874 Constitution contained the following clause:

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable, and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction.

Ark. Const. of 1874, art. 14, § 1. After Amendment 53 was adopted in 1968, we have the Education Article as we know it today.

That education has been of paramount concern to the citizens of this state since the state's inception is beyond dispute. It is safe to say that no program of state government takes precedence over it. In 1983, this court emphasized that "[e]ducation becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights." *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. at 346, 651 S.W.2d at 93. We further said in *DuPree* that "we believe the right to equal educational opportunity is basic to our society." *Id.* However, we shied away in *DuPree* from proclaiming education to be a fundamental right of each school child under the Education Article of our constitution. Indeed, the *DuPree* decision primarily dealt with the disparity in equal educational opportunity caused by the school-funding system and not with whether the system was inadequate under the Education Article.

d. Constitutional Duty

Our constitutional history underscores the point that education has always been of supreme importance to the people of this state. The General Assembly recognized this in 1997, when it acknowledged that the state is constitutionally required to provide a general, suitable, and efficient system of free public schools, and that the Arkansas courts have held that obligation to be a "paramount duty." *See* Act 1307 of 1997, § 1 (d)(1-2), codified at Ark. Code Ann. § 6-20-302(d)(1-2) (Repl. 1999). There is no question in this court's mind that the requirement of a general, suitable, and efficient system of free public schools places on the State an absolute duty to provide the school children of Arkansas with an adequate education. The next question, however, is whether this language also implies a fundamental right vested in the people of this state so as to require strict scrutiny of all legislative actions regarding it.

In resolving this question, we look first to the Arkansas Constitution. Article 2 of the Constitution, entitled *Declaration of Rights*, deals with the personal rights vested in the people of this state, including equality, free speech and free press, the right to trial by jury, the right to due process and bail, the right to be protected against self-incrimination and double jeopardy, the right to be protected against unreasonable searches and seizures, and the right to religious freedom. The Education Article is found in a separate article, Article 14, and it is couched in terms of the state's duty and not in terms of a personal right vested in the people. This court has said repeatedly that in construing the language of our constitution, we must give the language its plain, obvious, and common meaning. *See, e.g., Maddox v. City of Fort Smith*, 346 Ark. 209, 56 S.W.3d 209 (2001); *Daniel v. Jones*, 332 Ark. 489, 966 S.W.2d 226 (1998). Nonetheless, Lake View and the intervening school districts urge that a fundamental right can be implied from the language of Article 14. *See, e.g., Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 703 A.2d 1353 (1997) (constitution's specific charge to legislature to provide education is sufficient to afford fundamental-right status to beneficiaries of that duty).

Other states in the last decade have wrestled with the issue of whether education is a fundamental right under the

Education Article of their state constitutions, thus necessitating strict scrutiny of all legislative actions affecting education. Of course, the education language in each state constitution varies. Some states that have found their school-funding systems to be inadequate under their respective education articles simply have not addressed the issue of whether an adequate education is a fundamental right. *See, e.g., DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997); *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991).

This reluctance to discuss the matter, no doubt, is due in large part to the difficulty surrounding this issue. The Arizona Supreme Court commented directly on the confusion involved in the fundamental-right question. It noted that in one of its earlier decisions in 1973, it proclaimed that education was a fundamental right, but in the same opinion, upheld the existing school financing scheme, using the rational basis test rather than examining the system under strict scrutiny. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994) (questioning *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973)). The Arizona Supreme Court determined, however, that it need not resolve this "conundrum," because the Arizona Constitution placed a *specific* duty and responsibility on the Legislature to establish and maintain the public school system. *Id.* The issue was whether the present financing system satisfied the constitutional mandate of a general and uniform school system and not what standard should be applied in judicial review.

The Tennessee Supreme Court found its state school-funding system unconstitutional under the equal protection provisions of its constitution and, thus, refrained from deciding whether an adequate education was a fundamental right under its Education Article. *See Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993). Similarly, the Vermont Supreme Court held that an adequate education was essential under its state constitution, but it did not proclaim it to be a fundamental right. *See Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (1997). The court proceeded, however, to hold that its system "violate[d] the right to equal educational opportunities" under both its Education Article and equal

protection clause, and that there was no rational basis for the gross inequities in the educational opportunities offered to school children in different school districts in that state. *Id.* at 268, 692 A.2d at 397.

On the other hand, the New Hampshire Supreme Court has held that an adequate education is a fundamental right in that state:

> We hold that in this State a constitutionally adequate public education is a fundamental right. In so doing we note that "[t]he right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty." *Claremont I*, 138 N.H. at 192, 635 A.2d at 1381.
>
> We emphasize that the fundamental right at issue is the right to a State funded constitutionally adequate public education. It is not the right to horizontal resource replication from school to school and district to district. The substance of the right may be achieved in different schools possessing, for example, differing library resources, teacher-student ratios, computer software, as well as the myriad tools and techniques that may be employed by those in on-site control of the State's public elementary and secondary school systems. But when an individual school or school district offers something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny.

Claremont Sch. Dist., 142 N.H. at 473-74, 703 A.2d at 1359. The New Hampshire court then viewed the *Rose* standards "as benchmarks of a constitutionally adequate public education." *Id.* at 475, 703 A.2d at 1359. *See also Rose v. Council for Better Educ., Inc., supra* (holding in 1998 that an adequate education was a fundamental right under its Education Article). Similarly, the Wyoming Supreme Court affirmed an earlier

decision in *State v. Campbell County Sch. Dist.*, 19 P.3d 518 (2001), and reiterated that "[b]ecause education is a fundamental right and our citizens are entitled to equal protection under our state constitution, all aspects of the school finance system are subject to strict scrutiny, and statutes establishing the school financing system are not entitled to any presumption of validity." 19 P.3d at 535.

Turning to our authority in Arkansas, the seminal school-funding case, *DuPree v. Alma Sch. Dist. No. 30, supra*, did not measure the school-funding system against the Education Article but rather did so under the equality provisions of the state constitution. In doing so, this court stated that it was not necessary to decide whether education was a fundamental right because "we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the district." *DuPree*, 279 Ark. at 346, 651 S.W.2d at 93. In other words, because the system failed for lack of a reasonable and legitimate governmental purpose to support it, it was not necessary to use a heightened standard of review like strict scrutiny to examine the system's constitutionality. Judge Imber used the same reasoning when she ruled that the current funding system was unconstitutional in her 1994 order. She found it unnecessary to decide whether an adequate education was a fundamental right for purposes of adequacy and inequity, since the school-funding system failed to pass constitutional muster even using a rational-basis standard.

In his 2001 order, Judge Kilgore did not specifically state that an adequate education was a fundamental right under the Education Article. However, he did rule that he would apply a strict-scrutiny analysis to the state's legislation to decide whether there was constitutional compliance. Strict scrutiny usually goes hand-in-hand with a claim that a fundamental right has been impaired. *See, e.g., Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002) (the right to privacy for private sex between consenting adults was deemed a fundamental right where strict scrutiny would be the standard regarding any impairment). Judge Kilgore also announced at a pretrial hearing "that language in the Constitution is consistent with and supports the proposition that the State of Arkansas has a compelling interest in seeing that our children get adequate educations, or general, suitable and efficient

education. . . . That being the case, the standard that the State will be held to in showing that we do have an adequate system of education will be strict scrutiny."

With the exceptions of New Hampshire, *see Claremont Sch. Dist. v. Governor, supra,* and Kentucky, *see Rose v. Council for Better Educ., Inc., supra,* most states in recent years have avoided proclaiming that an adequate education is a fundamental right because that carries with it the obligation of the courts to examine and scrutinize all legislation respecting education strictly. We must admit to some apprehension about using a strict-scrutiny standard, because it has never been this court's constitutional function to micromanage the public schools of this state or even to retain jurisdiction over the public school system until, in our judgment, an adequacy standard has been achieved.

At the same time, this court is troubled by four things: (1) the Department of Education has not conducted an adequacy study; (2) despite this court's holding in *DuPree v. Alma Sch. Dist. No. 30, supra,* that equal opportunity is the touchstone for a constitutional system and not merely equalized revenues, the State has only sought to make revenues equal; (3) despite Judge Imber's 1994 order to the same effect, neither the Executive branch nor the General Assembly have taken action to correct the imbalance in ultimate expenditures; and (4) the State, in the budgeting process, continues to treat education without the priority and the preference that the constitution demands. Rather, the State has continued to fund the schools in the same manner, although admittedly taking more steps to equalize revenues. This being said, perhaps the recalcitrance of the State to reform the school-funding system is reason enough to adopt the heightened standard of strict scrutiny.

Nevertheless, because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied. Many states, as we have already discussed, appear to get lost in a morass of legal analysis when discussing the issue of fundamental right and the level of judicial scrutiny. This court is convinced that much of the debate over whether education is a fundamental right is

unnecessary. The critical point is that the State has an absolute duty under our constitution to provide an adequate education to each school child. Like the Vermont and Arizona Supreme Courts, we are persuaded that that duty on the part of the State is the essential focal point of our Education Article and that performance of that duty is an absolute constitutional requirement. *See Brigham v. State, supra; Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, supra.* When the State fails in that duty, which we hold today is the case, our entire system of public education is placed in legal jeopardy. Should the State continue to fail in the performance of its duty, judicial scrutiny in subsequent litigation will, no doubt, be as exact as it has been in the case before us.

For the foregoing reasons, we conclude that the State has not fulfilled its constitutional duty to provide the children of this state with a general, suitable, and efficient school-funding system. Accordingly, we hold that the current school-funding system violates the Education Article of the Arkansas Constitution, and we affirm the trial court on this point.

VI. Equality

The State next argues that the trial court erred in finding that the school-funding system was inequitable. On this point, the State contends that there are two types of equity: (1) horizontal, or dollar, equity where the State equalizes per-student revenues available across the state; and (2) vertical equity where efforts are made by the State to meet the special needs of certain students through categorical funding, such as the English-as-a-second language program, special education, gifted-and-talented programs, and vocational-technical training. According to the State, it is virtually impossible to equalize all revenues when special needs come into play and when certain value judgments must be made.

The State further maintains that it has met the Federal Range Ratio test and the GINI Index of Inequality for equal revenues available per student. Equal revenues per student is the correct test for equality, according to the State, and, thus, the trial court erred in concluding that the test for equality is the *actual money spent* per student rather than state money made available to the school districts. Finally, the State argues

that any disparity in the wealth of the school districts is offset by two legitimate governmental purposes in funding the schools the way it does: (1) the necessity to fund other state programs, and (2) local control of public schools by the school districts.[8]

There is no doubt in our minds that there is considerable overlap between the issue of whether a school-funding system is inadequate and whether it is inequitable. Deficiencies in certain public schools in certain school districts can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality. Bearing that in mind, we first address whether state *revenues* paid to the school districts under the school-funding formula is the test for deciding equality or whether the test is actual *expenditures* spent on the students. We conclude it is the latter and that the trial court was correct in so determining. The Arkansas Constitution has the following provisions guaranteeing equal treatment to its citizenry under the law:

§ 2. Freedom and independence.

> All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

§ 3. Equality before the law.

> The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.

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[8] At least two post-1994 legislative Acts specifically refer to the desirability of local control. *See* Act 1307 of 1997, codified at Ark. Code Ann. § 6-20-302(b) (Repl. 1999) and Act 917 of 1995.

§ 18. Privileges and immunities — Equality.

> The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.

Ark. Const. art. 2, §§ 2, 3, 18.

The answers to many of the State's arguments can be found in our decision of *DuPree v. Alma Sch. Dist. No. 30, supra,* which, again, was handed down almost twenty years ago. In *DuPree,* we found that the school-funding system then in existence violated the three equality provisions set out above. We first referred to "the undisputed evidence that there are sharp disparities among school districts in the *expenditures* per pupil and the education opportunities available as reflected by staff, class size, curriculum, remedial services, facilities, materials and equipment." *DuPree,* 279 Ark. at 344, 651 S.W.2d at 92 (emphasis added). With respect to whether local control by the school districts was a legitimate government interest or rational basis for disparities in educational opportunity among the school districts, we said: "[W]e can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the district." *Id.* at 346, 651 S.W.2d at 93. In holding that the system was unconstitutional, we said: "We come to this conclusion in part because we believe the right to equal educational opportunity is basic to our society." *Id.*, 651 S.W.2d at 93. We added: "For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity." *Id.* at 347, 651 S.W.2d at 93. We concluded: "If local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation." *Id.* at 349, 651 S.W.2d at 95 (quoting *Robinson v. Cahill,* 303 A.2d 273, 275 (N.J. 1973)).

It is clear to this court that in *DuPree,* we concentrated on expenditures made per pupil and whether that resulted in equal educational opportunity as the touchstone for constitutionality, not on whether the revenues doled out by the State to the school districts were equal. We were clearly

interested in *DuPree*, as we are here today, on what money is actually being spent on the students. That is the measuring rod for equality. Both Judge Imber in 1994 and Judge Kilgore in 2001 concluded that that was the case. Equalizing revenues simply does not resolve the problem of gross disparities in per-student spending among the school districts. It provides an educational floor of money made available to the school districts but in no way corrects the inherent disparity between a wealthy school district that can easily raise additional school funds for educational enhancement by passing millage increases far in excess of the 25 mill uniform rate and poorer school districts that are only offering, as we said in *DuPree*, the "barest necessities." 279 Ark. at 347, 651 S.W.2d at 93. We agree that the focus for deciding equality must be on the actual expenditures.[9] We affirm Judge Kilgore on this point.

Looking then to the end result of expenditures actually spent on school children in different school districts, we quickly discern inequality in educational opportunities. The deficiencies in Lake View and Holly Grove have already been noted. In both those districts, the curriculum offered is barebones. Contrast the curriculum in those school districts with the rich curriculum offered in the Fort Smith School District, where advanced courses are offered and where specialty courses such as German, fashion merchandising, and marketing are available. The inequality in educational opportunity is self-evident.

The same holds true for buildings and equipment. Whether a school district has rainproof buildings, sufficient bathrooms, computers for its students, and laboratory equipment that functions is all a matter of money. Certain schools in Fort Smith, for example, do not suffer from such deficiencies. Other schools in the Delta and in Northwest Arkansas where the student population is exploding are experiencing dire facility and equipment needs.

Again, we turn to Dr. Simon's assessment of the

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[9] We further note that federal regulations pertaining to the calculation of the disparity limitation under the Federal Range Ratio permit the Secretary of Education to calculate the percentage of disparity using either revenues or expenditures. *See* 34 C.F.R. § 222.63(a) (1994).

situation:

MR. LEWELLEN: Is it your -- is it your opinion that a child who lives in a poor district because of the property wealth values are low should be in a facility which is sub-standard to the facilities that are located in property wealthy districts?

DR. SIMON: I don't think that's fair.

MR. LEWELLEN: Do you agree with me that that situation existed in 1994 in the State of Arkansas?

DR. SIMON: Yes.

MR. LEWELLEN: And do you agree with me that that situation exists today in 2000 in the State of Arkansas?

DR. SIMON: Yes.

MR. LEWELLEN: And do you agree that based on that fairness that the State of Arkansas still has not passed a formula where it is responsible for constructing a cure for those situations in the poor districts?

DR. SIMON: Outside the parameters that have been set.

MR. LEWELLEN: Do you agree with me, they have not established a system to correct the problem?

DR. SIMON: Not to the -- not to the extent you're talking about, that's correct.

MR. LEWELLEN: Okay. Now, is it your opinion that all children have -- well, you've said that you believe facilities has something to do with the education of a child, right?

DR. SIMON: Yes.

MR. LEWELLEN: And I think you would agree that you think materials and other resources has something to do with the ability of a child to learn.

DR. SIMON: Yes.

MR. LEWELLEN: Okay. Then that being the case, do you think that all children in this State have equal physical facilities?

DR. SIMON: No.

MR. LEWELLEN: Do you think all children in this State have equal materials and resources in every district?

DR. SIMON: No.

The discrepancies in teacher salaries among Arkansas school districts have already been noted in this opinion. Well-paid and well-motivated teachers are what make the education engine run. Dr. Simon candidly admitted this in his testimony and also testified:

MR. LEWELLEN: But you're not paying your teachers equally across the State?

DR. SIMON: No.

In the face of this testimony, the State makes the implausible argument that more money spent on education does not correlate to better student performance. This position is contrary to Judge Imber's finding in her 1994 order and to the Tennessee Supreme Court: "[T]here is a 'direct correlation between dollars expended and the quality of education a student receives.'" *McWherter*, 851 S.W.2d at 141. The State's argument is farfetched in this court's opinion. We are convinced that motivated teachers, sufficient equipment to supplement instruction, and learning in facilities that are not crumbling or overcrowded, all combine to enhance educational performance. Certainly, Dr. Simon's testimony

confirms that. All of that takes money.

The State's retort on the variations in revenue among school districts is that Amendment 74 specifically contemplates variations and authorizes them. It is true that Amendment 74 states: "The primary reason for allowing such variations is to allow school districts, to the extent permissible, to raise additional funds to enhance the educational system within the school district." However, Amendment 74 does not authorize a system of school funding that fails to close the gap between wealthy school districts with premier educational programs and poor school districts on the lower end of the economic spectrum, which are mired in poverty and unable to provide a system of education much above the most elementary kind.

The initial inquiry in our equality analysis is whether school districts are impermissibly classified on the basis of wealth so that discrimination exists. We hold that a classification between poor and rich school districts does exist and that the State, with its school-funding formula, has fostered this discrimination based on wealth. Having identified the classification created by the school-funding formula, the next issue is what level of judicial scrutiny will be employed in this case. Two levels are offered by the parties. The heightened level is strict scrutiny under which the State would have to show, first, that it has a compelling interest to support disparate treatment in funding between school districts and, secondly, that the school-funding system is narrowly tailored to serve that interest. *See, e.g., Shaw v. Hunt*, 517 U.S. 899 (1996); *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979) ("Only when a classification is based on a suspect category . . . will strict scrutiny, a more demanding standard of review, be applied."). The less severe level is rational-basis review, where the question is whether there is merely a legitimate governmental purpose behind the disparate treatment in school funding between school districts, and whether the current school-funding system bears a rational relationship to that purpose. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Jegley v. Picado, supra.*

Strict-scrutiny review is unwarranted in this case. We have never considered school districts to be a suspect class for purposes of an equal-protection analysis. *See DuPree v. Alma*

Sch. Dist. No. 30, supra. See also San Antonio Indep. Sch. Dist. v. Rodriguez, supra. We hold, once again, that requiring the State to show a compelling interest to support the classification is unnecessary in this case, because the State fails to justify the classification even under the more modest rational-basis standard. *See DuPree v. Alma Sch. Dist. No. 30, supra.*

We turn then to the State's contention that even though disparities in educational opportunities may exist due to the property wealth of the individual districts, there are legitimate government purposes or rational bases for this. Those purposes, according to the State, are local control and other state programs. We rejected the argument of local control in *DuPree* in no uncertain terms and stated that such reasoning was illusory because deference to local control has nothing to do with whether educational opportunities are equal across the state. It is the General Assembly's constitutional duty, not that of the school districts, to provide equal educational opportunity to every child in this state. Furthermore, the State's claim that the General Assembly must fund a variety of state programs in addition to education and that this is reason enough for an inferior education system hardly qualifies as a legitimate reason.

It has long been the State's position that its duty is fulfilled under the state constitution if it pays school districts an equal amount in revenues on a per-student basis and then defers to local control as to how that money is spent. Nothing could be farther from the truth. It is the States's responsibility to provide an equal education to its school children and, as we said in *DuPree*, "[i]f local government fails, the state government must compel it to act." 279 Ark. at 349, 651 S.W.2d at 95 (quoting *Robinson v. Cahill, supra*). Deference to local control is not an option for the State when inequality prevails, and deference has not been an option since the *DuPree* decision.

It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being

substantially afforded to Arkansas' school children. It is, finally, the State's responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an adequate education in Arkansas. The State has failed in each of these responsibilities.

We hold that the trial court did not err in concluding that the current school-funding system violates the equal-protection sections of the Arkansas Constitution in that equal educational opportunity is not being afforded to the school children of this state and that there is no legitimate government purpose warranting the discrepancies in curriculum, facilities, equipment, and teacher pay among the school districts. It is clear to this court that, as we indicated in *DuPree*, whether a school child has equal educational opportunities is largely an accident of residence. We affirm the trial court on this point.

VII. Early Childhood Education

The State argues that while it may agree that as a matter of public policy pre-kindergarten programs may be one way to increase student achievement, it does not agree that such programs are mandated by the Arkansas Constitution. The State contends that Article 14, § 1, contemplates that public funds may be expended for education beyond grades one through twelve, but it does not mandate it. Rather, the State maintains, the constitution's language is permissive and gives authority not only to the General Assembly but also to local school districts to implement pre-kindergarten programs as they see fit. The State asserts that determinations as to what types of programs are best to promote student achievement should be made by the entities entrusted to make them by the state constitution, and those entities are the General Assembly and the public school districts, not the courts

Lake View responds that this court should apply constitutional remedies to the case at hand. It further asserts that the trial court's ruling simply states that under the

provisions of Arkansas Constitution Article 2, §§ 2, 3, and 18, the State must provide equal access to pre-school education, if the State is already either directly or indirectly financing some school districts that are providing early childhood education.

The Little Rock, Rogers, and Bentonville Intervenors also respond that the State's arguments might have some merit but for the uncontroverted testimony that the State cannot provide a constitutionally adequate education for students age six and older unless it establishes a program of pre-kindergarten education. The Intervenors' position, in a nutshell, is that if a child starts out behind due to no pre-school education, that child never makes up the lost ground. The Intervenors concede that Article 14 on its face does not mandate public education for students under the age of six. The Intervenors urge, however, that the State is required to "adopt all suitable means to secure to the people the advantages and opportunities of education[,]" under Article 14, and early-childhood education is clearly a suitable means. As a final point, the Intervenors emphasize that there was no evidence presented at trial to rebut the testimony of educators and experts that early-childhood education is a necessary component of an education system which reasonably expects to enable significant numbers of students to perform at grade level. It is also the most efficient way for the State to fulfill that expectation, according to the Intervenors.

The State's argument, boiled down to its essence, is that the plain language of Article 14, § 1, does not mandate the chancery court's order of State-provided, early-childhood education. We agree. Section 1 reads in pertinent part that the General Assembly and public school districts "may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it."

In its order, the trial court found:

> 7. Three facts were uncontroverted at trial: 1) A substantial number of our children are entering kindergarten and first grade significantly behind their peers; 2) Those

> children that enter the first grades needing remediation will have a difficult time performing at grade level by the third grade; and 3) If a student cannot perform at grade level, especially in reading, by the third grade, then he is unlikely to ever do so. The only possible conclusion is that in order to provide our children with an adequate education as required by the Constitution and ACTAPP, the State must forthwith provide programs for those children of pre-school age that will allow them to compete academically with their peers. The urgency of this need equals that of the deficiency in teacher salaries.

Later in its opinion, the trial court wrote that forming remedies was not the role of the courts, and courts should not proclaim remedies unless all else fails. The trial court concluded that "for now" these matters are "left to the legislature."

But aside from the fact that Article 14 does not require early childhood education and leaves that matter to the General Assembly, the trial court could not order the implementation of pre-school programs in any event. That is a public-policy issue for the General Assembly to explore and resolve. It is elementary that the powers of our state government are divided into three separate branches of government. *See* Ark. Const. art. 4, § 1. The state constitution further provides that one branch of government shall not exercise the power of another. *See* Ark. Const. art. 4, § 2.

This court has said that the legislature can neither be coerced nor controlled by judicial power. *See Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979). In *Wells*, we commented on the remedies being left to the legislature and not to the courts:

> The legislature is responsible to the people alone, not to the courts, for its disregard of, or failure to perform, a duty clearly enjoined upon it by the constitution, *and the remedy is with the people, by electing other servants, and not through the courts.*

Wells v. Purcell, 267 Ark. at 462, 592 S.W.2d at 104 (emphasis added). We then said:

> It must always be remembered that the state's constitution is neither an enabling act nor a grant of enumerated powers, and the legislature may rightfully exercise the power of the people, subject only to restrictions and limitations fixed by the constitutions of the United States and this state. Under our system of government the legislature represents the people and is the reservoir of all power not relinquished to the federal government or prohibited by the state constitution.

Wells, 267 Ark. at 464, 592 S.W.2d at 105 (internal citations omitted).

While it is uncertain whether the trial court, in its order, was underscoring the need for pre-school education or ordering its implementation, we hold that the trial court had no power to do the latter. Nor do we agree with the Intervenors that the courts of this state can mandate pre-school education as an essential component of an adequate education. That, again, is for the General Assembly and the school districts to decide. Article 14 contemplates that very thing when it refers to funding pre-six-year-old programs, as provided "by law."

VIII. Lake View's Arguments

We turn next to the various arguments raised by Lake View in its appeal.

a. 1994 Order As Law of the Case

Lake View first claims that law of the case, *res judicata*, laches, estoppel, and Ark. R. Civ. P. 60 should have been applied by the trial court at the compliance trial. Lake View, however, fails to discuss or

develop the latter four doctrines in its brief on appeal.[10] It is incumbent on an appellant to develop issues for purposes of appeal, as we will not consider assignments of error that are unsupported by convincing legal authority or argument. *See Porter v.Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997). Accordingly, this court will only address the point raised regarding law of the case.

Last term, this court discussed the doctrine of law of the case:

> The venerable doctrine of law of the case prohibits a court from reconsidering issues of law and fact that have already been decided on appeal. The doctrine serves to effectuate efficiency and finality in the judicial process. *Frazier v. Fortenberry*, 5 Ark. 200 (1843); *see also*, 5 AM. JUR. 2D *Appellate Review* § 605 (1995). We have said the following with regard to the law-of-the-case doctrine:
>
> > The doctrine provides that a decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998). On the second appeal, the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *Griffin v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994).
>
> *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 346, 47 S.W. 3D 227, 237 (2001).

Cadillac Cowboy, Inc. v. Jackson, 347 Ark. 963, 970, 69 S.W.3d 383, 388 (2002). In *Jackson*, we made it clear that the doctrine

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[10] Lake View does make one conclusory allegation regarding Rule 60: "Rule 60 prevented the [S]tate . . . from seeking modification, amendment, or nullification of any part of the 1994 [O]rders[.]"

governs issues of law and fact concluded in the first appeal. We have further held that the doctrine is "conclusive only where the facts on the second appeal are substantially the same as those involved in the prior appeal." *Wilson v. Wilson*, 301 Ark. 80, 82, 781 S.W.2d 487, 488 (1989). Thus, it does not apply if there is a material change in the facts. *See id.*

Lake View appears to be contending that the trial court in 2001 was bound by the 1994 order as law of the case. We disagree. The 1994 order was not appealed, but, even more importantly, there has been a material change in the school-funding landscape between the time of the 1994 order and the trial court's 2001 order. We have already discussed the 1995 and 1997 acts as well as Amendment 74, which was adopted by vote of the people in 1996. The issue at the compliance trial and before this court on appeal is whether the State is now in compliance with the state constitution by virtue of what it has done since 1994. The 1994 order, while instructive on certain points, was simply not binding on the trial court in 2001. We affirm the trial court on this point.

b. Desegregation Funds

Lake View next contests the failure of the trial court to include the desegregation money provided to the Pulaski County School Districts for purposes of the Federal Range Ratio to decide disparities in funding among the school districts. On this point, Judge Imber in her 1994 order included the desegregation funds under the formula, while Judge Kilgore excluded them in his 2001 order. We agree with Judge Kilgore that the money should not be included.

In making his decision, Judge Kilgore cited *Magnolia Sch. Dist. No. 14 v. Arkansas State Bd. of Educ.*, 303 Ark. 666, 799 S.W.2d 791 (1990). The State, in addition, cites this court to a later Eighth Circuit Court of Appeals opinion, *Little Rock Sch. Dist. v. Pulaski County Special School Dist.*, 83 F.3d 1013 (8th Cir. 1996). We believe that the Eighth Circuit case supports the trial court's decision.

In the *Little Rock Sch. Dist.* case, the Eighth Circuit discussed the fact that the state desegregation funds were "in addition to" existing state aid:

> The theme of the [Little Rock Schools Desegregation] Settlement Agreement was that the Pulaski County districts would receive the desegregation payments included in the agreement *in addition to* other state aid that they would have received. The language we previously cited expresses that theme, as does the statement that "[t]he funds paid by the State under this agreement are not intended to supplant any existing or future funding which is ordinarily the responsibility of the State of Arkansas." [Settlement Agreement] § II, paragraph E.

83 F.3d at 1019 (emphasis in original). According to this description, the state desegregation funds were separate and apart from normal state aid to education.

We agree that the desegregation funds do not constitute "state aid." Under federal regulations, "state aid" is defined as "any contribution, no repayment for which is expected, which is made by a State to or on behalf of local educational agencies within the State for current expenditures in the provision of free public education[.]" 34 C.F.R. § 222.61(d)(1) (1994).

We agree with the trial court that the desegregation money was not "state aid" for current expenditures and should not form part of state funds for purposes of the Federal Range Ratio test. Judge Imber's conclusion to the contrary in her 1994 order was not law of the case, as already decided in this opinion. Lake View has simply failed to convince this court that Judge Kilgore erred in his legal conclusion. As a result, we affirm the trial court on this point.

c. Weighted Average Daily Membership

Lake View also advances the claim that Judge Kilgore erred in not reverting to the 1994 school-funding formula, which used weighted average daily membership as opposed to categorical grants and aid. Again, Lake View posits that Judge Imber's 1994 order is law of the case, and her use of weighted average daily membership in the funding formula must be followed.

We disagree that *weighting* average daily membership is still a viable part of the school-funding formula. In 1995, the General Assembly changed the formula and substituted categorical grants and aid for the previous system where fictitious students were added to average daily school membership as a means of paying for the special needs of that school district. *See* Act 1194 of 1995.

The new school-funding formula is what Judge Kilgore measured against constitutional mandates. It would make no sense for him to determine compliance by examining the constitutionality of a formula that had been repealed by the General Assembly. We have previously held in this opinion that the 1994 order is not law of the case. Lake View's argument has no merit.

d. Excess Debt Millages

Lake View urges that the trial court erred in upholding Act 1300 of 1997, codified at

Ark. Code Ann. § 26-80-204(18) (Supp. 2001), which authorized school districts to subtract excess debt millages against the uniform tax of 25 mills owed to the State under Amendment 74.

Lake View's point appears to have merit. Amendment 74 provides in pertinent part:

> (b)(1) There is established a uniform rate of ad valorem property tax of twenty-five (25) mills to be levied on the assessed value of all taxable real, personal, and utility property in the state to be used solely for maintenance and operation of the schools.
>
> (2) Except as provided in this subsection the uniform rate of tax shall not be an *additional* levy for maintenance and operation of the schools but shall replace a portion of the existing rate of tax levied by each school district available for maintenance and operation of schools in the school district. The rate of tax available for maintenance and

> operation levied by each school district on the effective date of this amendment shall be reduced to reflect the levy of the uniform rate of tax. If the rate of tax available for maintenance and operation levied by a school district on the effective date of this amendment exceeds the uniform rate of tax, the excess rate of tax shall continue to be levied by the school district until changed as provided in subsection (c)(1). If the rate of tax available for maintenance and operation levied by a school district on the effective date of this amendment is less than the uniform rate of tax, the uniform rate of tax shall nevertheless be levied in the district.

Ark. Const. amend. 74 § (b)(1-2) (emphasis added).

What the General Assembly did by § 26-80-204(18) was change what comprises the millage requirement. Under Amendment 74, the uniform millage rate generates money solely for the maintenance and operation of the schools. Section 26-80-204(18), however, adds a new category, excess debt service millage, to meet each school district's obligation. Subsection (18) reads:

> (18) "Uniform rate of tax" means a uniform rate of ad valorem property tax of twenty-five (25) mills to be levied on the assessed value of all taxable real, personal, and utility property in the state to be used solely for maintenance and operation of the schools. In calculating the uniform rate of tax imposed by Arkansas Constitution, Article 14, § 3, as amended by Arkansas Constitution, Amendments 11, 40, and 74, the following categories of millage may be utilized to meet the minimum millage requirement:
>
> (A) The local school district's maintenance and operation millage;
>
> (B) The dedicated maintenance and operation millage;

(C) *Excess debt service millage;* and

(D) The millage derived from the ratio of the debt service funding supplements divided by the total assessment.

Ark. Code Ann. § 26-80-204(18) (Supp. 2001) (emphasis added).

Crediting excess debt service millage against the 25 mill obligation is not contemplated by Amendment 74. Nor can we accept the trial court's explanation for finding § 26-80-204(18)(C) to be constitutional. The trial court said:

> 5. The plaintiffs have raised the issue that Amendment 74 and Article 2, §§ 2, 3, and 18 have been violated by allowing under A.C.A. § 26-80-201 et seq. school districts to use the excess debt millages to satisfy the uniform tax rate of 25 mills. However, the court finds otherwise. Plaintiffs' argument is that Amendment 74 requires school districts to levy twenty-five mills to be dedicated to maintenance and operations, and that by failing to do so the State loses substantial sums of money that would otherwise be available for Arkansas public schools. Some school districts have levied various millages in order to secure debt incurred through bond issues. Because of the requirement that millages dedicated to the retirement of debt be equal to 150% of the indebtedness there are virtually always excess debt millages. In fact, it is represented in the bond indenture, and, therefore, the voters must be presumed to know that the excess millages are to be available for maintenance and operations.
>
> Plaintiffs complain that this use of excess debt service mills does not satisfy Amendment 74 and that the amendment requires each school district to levy twenty-five mills, independent of any other mills,

> exclusively for maintenance and operations. However, Amendment 74 (b)(2) states in part, "Except as provided in this subsection the uniform rate of tax shall not be an additional levy for maintenance and operation of the schools but shall replace a portion of the existing rate of tax levied by each school district available for maintenance and operation of schools . . ."
>
> The Plaintiffs argue for a result that could easily have been obtained by more specific language in the amendment. However, no such language is present, and therefore, the method of counting mills to meet the uniform rate of tax used by the State complies with the language of the Constitution.

In our view, the trial court assumes too much. It assumes, first, that there is always an excess debt service millage and, secondly, that taxpayers have, in effect, authorized by their votes that the excess be applied to maintenance and operation of the schools. Why taxpayers would "authorize" by implication that the excess be used for maintenance and operation and not for some other expense such as another capital expense is not explained by the court.

The record does not reflect how many school districts credit excess debt service millages against the 25 mills owed or even the value of the credits taken across the state. This, of course, is pertinent information that this court would have liked to have had at its disposal, but the State, in opposing Lake View's position, does not argue the financial impact of eliminating the excess-debt-service-millage credit.

In construing our state constitution, we give words their plain, ordinary, and common meaning. *See Frank v. Barker*, 341 Ark. 577, 20 S.W.3d 293 (2000); *Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998). The wording of Amendment 74 makes it abundantly clear that each school district is responsible for assessing a uniform rate of 25 mills for maintenance-and-operation purposes. If a school district already has in effect millages for maintenance and operation, those millages may be counted against the uniform rate of 25

mills required by Amendment 74. Nowhere, however, does Amendment 74 provide that part of a millage adopted by the school district for an entirely different purpose may be subtracted from the 25 mills owed. The General Assembly's legislation permitting excess debt service millage is clearly contrary to the plain meaning of Amendment 74.

The State, in its brief before this court, only addressed Lake View's argument in a footnote. In that footnote, the State maintained that Amendment 74 is not self-executing and that legislation was necessary to put the amendment into effect. Though the State does not make this argument, we note where Amendment 74, subsection (d), provides that "maintenance and operation" means "such expenses for the general maintenance and operation of schools as may be defined by law." Giving the General Assembly authority to define what expenses are included within the term "maintenance and operation," however, does not empower that body to change the uniform millage rate or alter the funds required to be sent to the State under Amendment 74.

We hold that Ark. Code Ann. § 26-80-204(18)(C) violates Amendment 74 of the Arkansas Constitution and is void and of no effect.

e. Incentive Award

Lake View next contends that the trial court erred in denying its posttrial request for an incentive award of $10 million. Lake View's primary assertion is that it has driven this litigation since its inception in 1992, and the State has made great strides in education due to its efforts. It cites two cases to support its argument. *See In Re: Continental Illinois Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992); *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991).

Neither case is persuasive. First, neither case is a school-funding matter involving a monetary claim against a state government. In both cases, the Seventh Circuit Court of Appeals discussed the duties of a class representative, and only *In Re: Continental Illinois Sec. Litig.* did the court address the fact that in some instances, a plaintiff may be entitled to an incentive fee. However, the court in neither case concluded that the plaintiff involved was entitled to an incentive award.

In its brief, Lake View failed to cite to a rule for when an incentive award is appropriate or to develop an argument based on that rule. We have said time and again that this court will not research an appellant's argument for it. *See, e.g., Holt v. Wagner*, 344 Ark. 691, 43 S.W.3d 128 (2001).

We finally note that the trial court did not specifically address Lake View's incentive-award claim but issued a blanket denial of all claims not addressed. Regardless, Lake View's failure to develop this point legally or factually is reason enough to affirm the trial court on this issue.

f. Contempt and Retroactive Funding

Lake View submits that the record clearly establishes that there was an intentional violation of Judge Imber's 1994 order by the State with the passage of the 1995 and 1997 legislative acts. Thus, according to Lake View, a contempt sanction is warranted. Lake View further maintains that retroactive funding by the State to the school districts back to 1994, under the school-funding formula it espouses, is required. However, Lake View leaves this court in the dark as to what that retroactive funding should be and which school districts should receive it.

Again, our failure to embrace Lake View's law-of-the-case argument vis-à-vis Judge Imber's 1994 order largely decides the issue of contempt. Moreover, we are hard pressed to conclude that the State is in contempt of the 1994 order, when we have already concluded that the issue in this appeal is whether the 1995 and 1997 legislation as well as Amendment 74 have brought the state into constitutional compliance.

With regard to retroactive funding, Lake View's argument suffers from lack of specificity and citation to authority. We, again, observe that we will not develop an appellant's argument for it or do an appellant's legal research on a point raised. *See Holt v. Wagner, supra.*

This point has no merit, and we affirm the trial court.

g. Remedies

Lake View argues generally that the trial court should have ordered specific remedies against the State. What Lake View appears to be arguing is that the trial court should have directed the State to take specific steps to render school funding constitutional. We, however, do not see that as the trial court's or this court's function. Development of the necessary educational programs and the implementation of the same falls more within the bailiwick of the General Assembly and the Department of Education. The Ohio Supreme Court acknowledged the different functions in the branches of government regarding remedies when it said: "[W]e recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster [and we] refuse to encroach upon the clearly legislative function of deciding what the new legislation will be." *DeRolph v. State*, 78 Ohio St. 3d at 213, n.9, 677 N.E.2d at 747. *See also Tennessee Small Sch. Sys. v. McWherter, supra* (affirming trial court's holding that the appropriate remedy should be fashioned by the General Assembly); *Brigham v. State, supra* (holding that the court's duty was solely to define the impact of the State Constitution on educational funding, not to fashion and impose a remedy; "The remedy at this juncture properly lies with the Legislature.") The trial court's role and this court's role, as previously discussed in this opinion, are limited to a determination of whether the existing school-funding system satisfies constitutional dictates and, if not, why not.

VIII. Attorneys' Fees

In a separate brief, Lake View vigorously contends that the trial court was in error when it used a "hybrid" method of calculating attorneys' fees which resulted in a fee award of $9,338,035 and no costs. What the trial court should have done, according to Lake View, is award a percentage fee based on a common fund of $130 million, which, it submits, was created by its efforts. Contingent fees ordinarily range from twenty-five percent to forty percent of the common fund, it claims. Thus, its fee award should have been $32,500,000 or $52,000,000. Moreover, Lake View contends that because the benefit to the school districts now exceeds $130 million (almost $311 million), the attorneys' fees awarded should be even higher. Lake View bemoans the fact that the trial court's fee award works out to about six-and-a-half percent of the

common fund. Lake View also asks for reimbursement of its costs.

The State also appeals the fee award but contends that it was too high. According to the State, the trial court should have awarded fees based only on a "lodestar" method, which basically is tied to the number of hours attorneys have worked on a case, with the potential for a "multiplier" for contingent and novel litigation. The State advocates a fee based on the total hours worked at an hourly rate of $150 an hour with no multiplier.

In *Lake View II*, this court held that "an economic benefit did accrue to the State of Arkansas due to Lake View's efforts and attorneys' fees should be awarded." 340 Ark. at 497, 10 S.W.3d at 902. However, we did not hold what that economic benefit was. We noted that "this is a unique case with a unique set of circumstances," and we held that under these exceptional facts, the State had waived its right to sovereign immunity. *Id.* We stated that we were "not sanctioning attorneys' fees in all public-interest litigation or endorsing a new exception to the American Rule." *Id.* In remanding this issue to the trial court, we refused to make a pronouncement on how the fees should be paid, stating that this was a task for the trial court to undertake. *See id.* We mentioned both a percentage fee based on economic benefit or the lodestar approach based on hours worked as possible methods for awarding attorneys' fees. *See id.*

On remand, the trial court ultimately awarded attorneys' fees to Lake View counsel in the amount of $9,338,035.00. In making its award the trial court used a $130 million economic benefit, which it stated the parties had agreed to, as the starting point for calculating fees. The court next examined whether a percentage of that economic benefit or "some other approach" was appropriate in this case. The court noted: "One purpose of the percentage method is to encourage early settlement by not penalizing efficient counsel and ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation." The court observed that this litigation had been "long and arduous" and that the issues involved were novel and difficult. The court further observed that the Lake View counsel were placed "at a very high risk because of the time and effort involved and

the uncertainty of success. . . ." The court pointed to the 1995 and 1997 legislation as well as Amendment 74 and "a common fund of $130,000,000" as the results of the attorneys' efforts.

The trial court then cited other common-fund cases where a percentage of the fund had been awarded as attorneys' fees. The cases cited were all class-action cases involving either a business or municipal corporation, or an illegal-exaction issue. The trial court stated that Lake View counsel requested a fee of twenty-five percent of the "common fund" and that expert witnesses had testified that contingent fees "are normally 33 1/3% and even 40% in extremely difficult cases."

Based on the expert witnesses, affidavits, the contingent nature of the case, and the factors for awarding attorneys' fees set out in *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), the trial court awarded the following attorneys' fees:

> Liability Phase: period prior to February 1998:
> award: $8,500,000.00.
>
> calculation: 6.5% of $130,000,000.00, or, alternatively, 15,000 hours (supported by Lake View affidavit) x $150.00 per hour x 3.877 (multiplier court stated was reasonable based upon length of litigation, difficulty, and contingent nature of success).
>
> February, 1998—June 18, 2000
>
> award: $525,000.
>
> calculation: attorneys estimated 4500-5500 hours of work and requested no particular rate. The court reduced the hours to 3500 and used the $150 per hour rate.
>
> June 19, 2000—November 1, 2000
>
> Attorneys kept contemporaneous work records for this period, per the trial court's order.

award: $313,035.

calculation: 2,086.90 hours x $150 per hour.

Total Award: $9,338,035

At the outset, we must admit to some concern about the lack of time records for the number of hours claimed to have been worked in this case for the liability phase. The trial court found, however, that no one disputed the 15,000 hours claimed, and Lake View attested to the total hours by affidavit. The State, in its brief on appeal, merely questions the total hours worked in a footnote. Accordingly, we will accept 15,000 as the hours worked in the liability phase, as found by the trial court.

We disagree with Lake View, however, in two respects. It is virtually impossible to fix precisely what the economic benefit to the state has been as a result of counsels' efforts. To be sure, there has been an economic benefit to the State, as this court acknowledged in *Lake View II*. But just what that exact benefit might be is fodder for speculation. $130 million was simply the amount agreed to by opposing counsel in an effort to settle the case and to decide upon appropriate attorneys' fees for Lake View counsel.

Our second disagreement concerns the propriety of arguing caselaw involving fees awarded in class-action lawsuits involving a corporation or an illegal-exaction issue as precedent for a fee award in a school-funding case, where taxpayer money will be used to pay those fees. The two situations do not appear to be remotely comparable. Indeed, counsel for Lake View at oral argument was unable to cite this court to a single school-funding case where a percentage fee based on an economic-benefit theory had been awarded. In the one school-funding case in recent years where a state supreme court affirmed an attorneys' fee to successful counsel, the lodestar method was employed and not a percentage fee. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 761 A.2d 389 (1999).

The trial court used the *Chrisco* factors for guidance in assessing attorneys' fees. *See Chrisco v. Sun Indus., Inc., supra.* Those factors are (1) the experience and ability of counsel; (2)

the time and labor required to perform the legal service properly; (3) the amount involved in the case and the results obtained; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged in the locality for similar services; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client or by the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. *See id.* This court recognized, in *Chrisco*, the superior perspective of the trial judge in weighing the applicable factors, and we concluded that we would not set aside a trial court's fee award absent an abuse of discretion.

It is obvious to this court in the case at hand that the trial court used most of the *Chrisco* factors in making his award. But in his analysis, he looked to both a percentage fee based on six-and-one-half percent of $130 million and hours worked at a rate of $150 an hour, plus a multiplier. Thus, the initial award of $8,500,000 for the liability phase of the litigation was based, alternatively, on a percentage calculation and also on hours worked, with a 3.778 multiplier based on the length, difficulty, risk, and importance of the case.

Because the economic benefit in this case does not lend itself to a firm figure and because the fee award must be paid by the government, either state or local, from tax revenues, we reject a percentage fee in this case. Furthermore, this court has never expressly adopted a multiplier against hours worked as a means for arriving at appropriate fees. We will not do so in this case.

To reiterate what we said in *Lake View II*, this is a unique case with a unique set of circumstances, where there is no question but that the state and local school districts derived an economic benefit. Ordinarily, there could be no fee award assessed against the State due to the doctrine of sovereign immunity under our state constitution. It is only because the State waived sovereign immunity in this case that the issue of an attorneys' award became viable.

We conclude that attorney's fees based on hours worked at an hourly rate of $150 is appropriate in this case. The novelty and difficulty of this case, the results obtained, the hours worked, the expertise of counsel, and the effect on

other legal work of counsel, all militate in favor of an attorney's fee, as we previously held in *Lake View II*. Nevertheless, for reasons already stated, we cannot justify an award based on a percentage applied against $130 million or the use of a multiplier to enhance the fee. We hold that, in so doing, the trial court abused its discretion.

We modify the trial court's fee award to a total fee of $3,088,035, which is based on total hours worked, 20,587 hours, multiplied by the hourly rate of $150 per hour. We further modify the trial court's order and award costs in the amount of $309,000, which amount was supported by a Lake View affidavit. The total award of attorneys' fees and costs, as modified, is $3,397,035.

IX. Stay

Because we hold that the current school-funding system is unconstitutional, our schools are now operating under a constitutional infirmity. Other supreme courts facing this dilemma have either remanded the matter to the trial courts or stayed the court's mandate in order to give the General Assembly and Executive Branch an opportunity to cure the deficiencies. *See, e.g., Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 703 A.2d 1353 (1997) (staying all further proceedings until the end of the upcoming legislative session and maintaining present funding system through the 1998 tax year); *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) (staying the effect of the decision for twelve months and remanding to the trial court for entry of judgment and retention of jurisdiction until legislation is enacted and in effect for action as may be necessary in conformity with opinion); *Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (1997) (entering default judgment for students and school districts and remanding so that jurisdiction could be retained until valid legislation enacted and in effect, and for any further proceedings); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994) (reversing and remanding the case to the trial court for entry of judgment and retention of jurisdiction to determine within a reasonable time whether legislative action had been taken); *Edgewood Ind. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (staying the effect of the Supreme Court's previously-ordered injunction until April 1, 1991); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)

(withholding the finality of the decision until 90 days after the adjournment of the General Assembly).

Clearly, the public schools of this state cannot operate under this constitutional cloud. Were we not to stay our mandate in this case, every dollar spent on public education in Arkansas would be constitutionally suspect. That would be an untenable situation and would have the potential for throwing the entire operation of our public schools into chaos. We are strongly of the belief that the General Assembly and Department of Education should have time to correct this constitutional disability in public school funding and time to chart a new course for public education in this state. Accordingly, we stay the issuance of our mandate in this case until January 1, 2004. This will give the General Assembly an opportunity to meet in General Session and the Department of Education time to implement appropriate changes. On January 1, 2004, the stay will terminate, and this case will be over. Any subsequent challenge will constitute separate litigation.

X. *Conclusion*

We emphasize, once more, the dire need for changing the school-funding system forthwith to bring it into constitutional compliance. No longer can the State operate on a "hands off" basis regarding how state money is spent in local school districts and what the effect of that spending is. Nor can the State continue to leave adequacy and equality considerations regarding school expenditures solely to local decision-making. This court admits to considerable frustration on this score, since we had made our position about the State's role in education perfectly clear in the *DuPree* case. It is not this court's intention to monitor or superintend the public schools of this state. Nevertheless, should constitutional dictates not be followed, as interpreted by this court, we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case.

CORBIN and HANNAH, JJ., concur.
GLAZE, J., concurs in part and dissents in part.
IMBER, J., not participating.
Special Justice CAROL DALBY joins.

DONALD L. CORBIN, Justice, concurring. I concur in the resolution of this case as reflected in the majority's opinion. I write separately, however, to voice my concern over the personal tenor of this lawsuit as reflected in the briefs and motions filed by the attorneys for Lake View. During the course of this appeal, many motions, most of which were purely procedural, were filed by both the State and Lake View. In at least two of their pleadings, Lake View's attorneys raised the specter of racism. In short, they asserted that they were being treated unfairly by the State and this court on the basis of the color of their skin.

In one of those pleadings, Lake View's attorneys compared their plight to that of the African-Americans in the landmark cases of *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education*, 347 U.S. 483 (1954). Such allegations of racial discrimination are certainly very serious and should not be made lightly. However, from my view of the case, they are completely unfounded and without factual support. As such, the behavior of these attorneys, in my opinion, is reprehensible.

If this were not bad enough, Lake View's attorneys continued this theme of racial discrimination in their brief on the issue of attorney's fees. There, they stated in no uncertain terms that they had been given such a small attorney's fees, over $9 million, because they were African-American. They further stated that had they been Caucasian, they would have received a much bigger sum. They wrote:

> The vast differentiation in the fees that has been allowed in this cause is glaring in that the appellant's attorneys are the only African-American team of attorneys who have appeared before this court in a public interest case and are now receiving a disparaging fee. The members of the court must take care to recognize the implications of the 14th Amendment of the United States Constitution and Article 2, Sections 2, 3 and 18 of the Arkansas Constitution require that appellant's attorneys enjoy the same constitutional rights

as do Caucasian attorneys in similar situation.

As with the motions, Lake View's attorneys offered nothing in the way of proof to support their claim that they were discriminated against in being awarded a paltry $9,338,035.00. Indeed, it is difficult to imagine that any such proof exists, as the chancellor's order demonstrates that he held these attorneys in high esteem. Furthermore, the cases on which Lake View's attorneys rely, where Caucasian attorneys allegedly received large sums of money, are not school-funding cases. Counsel for Lake View's attorneys admitted in oral argument that he had not found any school-funding case where a percentage fee was awarded.

In sum, these unfounded allegations of racism are reckless and disrespectful, both to this court and to the lower court. They are an unwanted distraction from the real issues in this case. The issue of race simply did not enter into this court's decision. Indeed, I am completely confident in saying that the skin color of Lake View's attorneys played no part whatsoever in this court's decision. I am equally confident that it played no part in any of the lower court proceedings.

I understand that there was a certain amount of posturing going on in this case, both by the State's and Lake View's attorneys, and that this case was a high-profile media event. Be that as it may, unfounded and unsupported allegations of racism have no business in a lawsuit of this nature.

JIM HANNAH, Justice, concurring. I concur with the majority that the current public school system fails to meet the standards for the public schools required under our constitution. I write separately to set out why I reach the same conclusion and to clarify that the role of this court is to determine whether our public school system meets our constitutional standards. The role of this court is not to direct the General Assembly in what must be done to provide the required public school system. Under our constitution, the General Assembly bears the duty to provide a public school system that complies with our constitution.

The issues presented in this case include whether the

current funding system is adequate and whether it is equitable. These two issues may be considered simply as a question of whether the current school system provided by the General Assembly meets the constitutional requirements of a "general, suitable, and efficient system of free public schools...." Ark. Const. art. 14, §1. It does not.

The Constitution of the State of Arkansas provides that the State must maintain a general, suitable, and efficient system of free public schools. Ark. Const. art. 14, § 1. The obligation to provide the required system of public schools belongs to the General Assembly. The Arkansas Constitution vests in the General Assembly the duty and authority to establish, maintain, and support a public school system. *Barker v. Frank*, 327 Ark. 589, 939 S.W.2d 837 (1997); *E. Poinsett County Sch. Dist. No. 14 v. Massey*, 315 Ark. 163, 866 S.W.2d 369 (1993); *Saline County Educ. Bd. v. Hot Springs Educ. Bd.*, 270 Ark. 136, 603 S.W.2d 413 (1980). *See also, Lemaire v. Henderson*, 174 Ark. 936, 298 S.W. 327 (1927). In *Wheelis v. Franks*, 189 Ark. 373, 72 S.W.2d 231 (1934), this court stated:

> It has been too often held, as now to be a matter of debate, that the Legislature is clothed by the Constitution with plenary power over the management and operation of the public schools. It is for the Legislature to declare policy with reference to the schools, and however much this court might doubt the wisdom of the policy declared, it has no power to alter it.

Wheelis, 189 Ark. at 376. That the General Assembly has plenary power over the public schools means that it has full power. *Beard v. Albritton*, 182 Ark. 538, 31 S.W.2d 959 (1930). The responsibility for the creation, organization, and regulation of that system of public schools thus is within the exclusive province of the General Assembly. *Wallace Sch. Dist. v. County Bd. of Educ.*, 214 Ark. 436, 439, 216 S.W.2d 790 (1949). Supervision of the public schools is vested in such officers as the General Assembly may provide. Ark. Const. art. 14, §4.

The role of this court is not to dictate policy; rather, it is to interpret the constitution. As this court stated in *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986):

> Ever since *Marbury v. Madison*, 1 Cranch 137, was decided in 1803, the Supreme Court has had the responsibility of interpreting the United States Constitution and the state courts that of interpreting the state constitutions. But the judicial authority does not extend beyond interpretation. The courts do not have the power to hold a constitutional mandate in abeyance; they should not have that power. The constitutional way of doing things may be slow at times, but it is the right way.

Creviston, 288 Ark. at 293.

Thus, there is no question that this court has the obligation and authority to interpret the constitutional provisions regarding schools and determine whether the General Assembly is fulfilling its constitutional duty to provide a general, suitable, and efficient system of free public schools.

Previous case law confirms this conclusion regarding our duty to interpret the constitution. In the years since the present constitution was adopted, this court has had occasion to interpret provisions of Article 14 of our constitution on many occasions. As already noted, this court has declared that the General Assembly is obligated under the constitution to establish and maintain the public schools. *Wallace, supra.* This court has also declared that the General Assembly has the obligation to create schools and set the boundaries of districts. *Beard, supra.* The authority to decide how the state is to be divided up in public schools lies with the General Assembly and is "supreme." *Massey*, 315 Ark. at 169. *See also, Krause v. Thompson*, 138 Ark. 571, 211 S.W.2d 925 (1919). The issue of funding of school districts has also been before this court on a number of occasions as it relates to the General Assembly's duty to provide a general, suitable, and efficient school system under the constitution. *Dupree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983); *see also, Krause, supra.*

This court has not specifically defined the terms "general, suitable, and efficient." The word "general" in Article 14, Section 1, means that the public schools required under the constitution must be of common benefit to those who are to be served by the schools, i.e., those who are

between six and twenty-one years of age.[11] The public schools must offer "gratuitous instruction of all persons between the ages of six and twenty-one...." *Special Sch. Dist. No. 65 v. Bangs*, 144 Ark. 34, 36, 221 S.W. 1060 (1920). In 1885, this court stated: "It is the clear intention of the constitution and the statutes alike, to place the means of education within the reach of every youth." *Maddox v. Neal*, 45 Ark. 121, 124 (1885). "Education at the public expense has thus become a legal right." *Id.* Under our constitution, educational opportunity may not be "controlled by the fortuitous circumstances of residence." *Dupree*, 279 Ark. at 345. Thus, "general" means a "suitable" education must be afforded to all between the ages of six and twenty-one.

The word "suitable" may also be understood by reference to earlier decisions of this court. In *Fort Smith School District v. Maury*, 53 Ark. 471, 14 S.W. 669 (1890), this court stated:

> The duty to establish and keep in operation schools is not met by the employment of teachers and keeping them at the school house; but it demands that suitable persons shall be kept as teachers, and a school maintained adapted to the intellectual and moral advancement of pupils.

Maury, 53 Ark. at 473. *See also, Berry v. Arnold Sch. Dist.*, 199 Ark. 1118, 1124, 137 S.W.2d 256 (1940). This court has also stated that there should be a constant effort to raise the standards of the public schools and the General Assembly has the power to adapt our schools to the most advanced standards in order to give our youth the best education obtainable on all subjects. *Dickinson*, 120 Ark. at 88. In *Maury, supra*, this court went on to note that the duty to establish and keep schools in operation necessarily included the duty of agencies set up by the General Assembly to visit the schools, noting, and then correcting poor instruction and lack of progress. *Maury*, 53 Ark. at 473-74.

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[11] As the majority notes, whether early childhood education is to be provided is a public policy issue for the General Assembly to resolve. It is not required under the constitution.

The discussion in *Maury, supra, Berry, supra,* and *Dickinson, supra,* also casts light on the meaning of "efficient." A system must be provided by the General Assembly that is capable of effectively fulfilling the constitutional mandate for a general and suitable system of public schools. The word "efficient" is defined as "Making, causing ... Effective in producing the desired result with minimum wasted effort." *The New Shorter Oxford English Dictionary* 787 (Edition 1993). It appears doubtful to me that the framers of our constitution had a definition of "efficient" in mind similar to that set out in *Rose v. Council for Better Education, Inc.,* 790 S.W.2d 186 (Ky. 1989). As noted in the majority opinion, the definition in *Rose* was relied upon by both Judge Kilgore and Judge Imber. In *Rose,* the Kentucky Supreme Court defined an efficient education in terms of educational subject matter and level of proficiency to be obtained. As the majority goes on to note, the General Assembly may have been influenced by the definition in *Rose* when Acts 1108 and 1307 of 1997 were adopted. However, whatever the definition of efficient might be, the adoption of such specific methods and goals in public education as discussed in *Rose, supra,* is a matter of policy left by our constitution to the General Assembly. *See Wheelis, supra.* Our duty is to determine whether the public schools as presently functioning meet the constitutional requirements of a "general, suitable, and efficient system of free public schools." Ark. Const. art. 14, § 1.

Although the terms "General, suitable, and efficient" might be more finitely defined, under the facts of this case, further definition is not necessary. The meaning of the words general, suitable and efficient that may be derived from our case law is more than sufficient to use in determining whether the constitutional mandate has been met by the General Assembly.

I also note that under the facts of this case, we need not determine whether judicial review is under strict scrutiny or whether there is a fundamental right to the constitutionally mandated general, suitable, and efficient education. In 1885, this court held plainly that every child entitled to a public education has a right to a general, suitable, and efficient education in the public schools. *Maddox, supra.* Under any conceivable standard of review, the current system is woefully inadequate and does not begin to fulfill the constitutional

mandate.

The majority opinion sets out the facts, and I will not repeat them here. The examples provided hardly scratch the surface of the inadequacies of the current public school system. Large numbers of our students test below the national average. A majority of Arkansas students require remediation in math or English when they start college. Our classroom teachers are substantially underpaid. Compensation of teachers is not even consistent between districts.

To see the gravity of the problem, we need look no further than to a district where the entire math program in one school is offered by a grossly underpaid substitute teacher who is neither provided with sufficient supplies, materials, or computers, nor adequate physical facilities. We also need look no further than to a district where students are not afforded reasonable toilet facilities, where roofs leak, where buses do not meet minimum state standards, and where there are buildings without heat. It is the obligation of the General Assembly to provide the constitutionally required facilities, materials, equipment and competent teachers. *Maury, supra; Berry, supra.*

The constitution places the responsibility squarely upon the General Assembly to establish, maintain, and support a public school system which provides a general, suitable, and efficient educational opportunity to all students between the ages of six and twenty-one. *See* footnote 1. Since the adoption of the present constitution in 1874, school districts have been created, and responsibility for taxation for schools has in part been transferred to the local level. Local districts have run their schools, and the public is accustomed to local control. However, none of this alters the General Assembly's responsibility under our constitution.

The General Assembly has been well within its constitutional authority in the creation of the districts and in allowing local control. This court has long recognized that the General Assembly must employ agencies to accomplish the obligation of establishing and maintaining a system of free public schools. *Lemaire,* 174 Ark. at 939. *See also, Allen v. Harmony Grove Consol. Sch. Dist. No. 19,* 175 Ark. 212, 298 S.W.2d 997 (1927). The State may establish boards and

appoint directors, but such boards and directors are only agents of the General Assembly. *Maddox, supra.* Boards and directors are but trustees appointed to run the system the constitution requires. *Id., see also, Allen, supra.* If the system does not function properly, the General Assembly bears responsibility whatever the cause. *See Dupree, supra.*

The majority notes the frustration that the Arkansas Department of Education has failed to complete an adequacy study requested by the General Assembly. The trial court stated that to determine the amount of funding "for an education system based on need and not on the amount available but on the amount necessary to provide an adequate educational system, the court concludes an adequacy study is necessary and must be conducted forthwith." This is a failure of the General Assembly. The Department of Education, in this context, is acting as an agent of the General Assembly.[12] The Department's inaction is a matter for the General Assembly to resolve. *Wheelis, supra.* It is the General Assembly's duty under the constitution to provide the required public school system. It is up to the General Assembly to do whatever it must do with respect to boards, districts, or bureaucracies to make the system meet the constitutional requirements.

The General Assembly is free to decide how to establish and maintain a system of public schools that meet the constitutional mandate. *Barker, supra.* The current public school system does not meet constitutional requirements. The General Assembly must now act. We do not have the power to hold a constitutional mandate in abeyance. *Hutton v. Savage,* 298 Ark. 256, 769 S.W.2d 394 (1989); *Creviston, supra.*

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[12] The Department of Education is not created or established by the constitution. It was created by the General Assembly. *See* Act 169 of 1931. Supervision of the public schools is vested ultimately in the General Assembly. *Barker, supra;* Ark. Const. art. 14, §4. A State Board of Education constituting the State Department of Education was created by the General Assembly in Act 169 of 1931. In 1931, under Act 169, members of the Board were elected. In Act 244 of 1937, the General Assembly directed that the board members be appointed by the Governor. While the General Assembly has allowed the Executive Department to appoint members of the State School Board, the duty to supervise the public school system remains with the General Assembly.

I also note that, as the majority discusses, the issues raised in this case include whether the current funding system is adequate and whether it is equitable. These two issues are inexorably connected and what is actually at issue before this court is simply whether the current school system provided by the General Assembly meets the constitutional requirements of a "general, suitable, and efficient system of free public schools...." Ark. Const. art. 14, § 1. Funding plays a role, in determining whether a general, suitable, and efficient system of public schools is being provided. In *Dickinson v. Edmondson*, 120 Ark. 80, 178 S.W. 390 (1915), this court stated: "The Legislature has no authority to select an arbitrary basis for the disbursement of funds. . .." *Dickinson*, 120 Ark. at 90.

The issue in this case is more complex than a mere funding issue. The majority cites *Dupree*, in its discussion of funding quotes the *Dupree* opinion where this court stated that, "[f]or some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity." *Dupree*, 279 Ark. at 93. This statement by the court in *Dupree* in 1983 may also be interpreted as stating simply that bare and minimal sufficiency does not satisfy the requirements of a suitable public school system.

I agree that in practical terms it is highly doubtful that meaningful reform will ever be achieved by the General Assembly unless it determines actual expenditures per pupil and makes necessary decisions on funding. That is something the General Assembly must deal with. The funding required does relate to the constitutional requirement for education, and the General Assembly must address it. The issue of wealth of districts is less helpful. Whether there is classification based on wealth exists begs the real issue. The wealth of a district with respect to a general, suitable, and efficient public school is not relevant because the state must assure the required educational opportunities are provided regardless of wealth.

Looking for inadequacy and inequality in funding does not necessarily answer the real issue. The real issue is whether each child is provided the constitutionally required

educational opportunities. *Maddox, supra.* The real issue is whether all students are afforded the constitutionally required education.

Amendment 74 must also be noted in this discussion, because it specifically provides that school districts may "to the extent permissible" raise additional funds to "enhance the educational system in the school district." Ark. Const. amend. 74. "Enhance" means the educational opportunities that are being provided by the additional funding are above and beyond the general, suitable, and efficient education required under the constitution. Therefore, inequality between districts may well constitutionally exist. It may not, however, exist as to provision of the constitutionally required "general, suitable, and efficient" public schools. In short, while I agree that the present system is unconstitutional, I cannot agree that the General Assembly is bound to assure that each student must receive precisely the same educational opportunities, facilities, curricula, or equipment. Amendment 74 will not allow this conclusion. Perhaps that is why the majority opinion speaks in terms of substantially equal educational opportunity, rather than precisely the same.

I also write to state that while I agree that under *Lake View II*, attorneys' fees will be awarded in this case, I do not agree that fees should be granted based upon acquiescence by the State regarding work done by the attorneys. Documentation of work done by the attorneys and costs incurred is woefully inadequate. There is a lack of records of attorney activity until 1998. For the existing billings between 1998 and 2000 there are days when the billings are quite unclear. The records also imply that, for at least three years, there was little, if any, activity at all. That would mean that over the years there was activity the attorneys were billing in excess of two thousand hours per year.

The use of school funds for other than their intended purpose is specifically limited by the Arkansas Constitution. Ark. Const. art. 14. *See also, Special Sch. Dist. of Ft. Smith v. Sebastian County,* 277 Ark. 326, 641 S.W.2d 702 (1982). If fees and costs are to be awarded in a case involving constitutionally protected funds, then, at the very least, supporting documentation should be required.

TOM GLAZE, Justice, concurring in part and dissenting in part. I write first to repeat my earlier dissent that this case should have ended when (1) then Chancellor Imber entered her orders in 1994, (2) this court dismissed the appeal from those orders, and (3) the Lake View School District failed to cross-appeal from the chancellor's orders. *See Lake View School District No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000) (Glaze, J. dissenting) (majority opinion now refers to as Lake View II). In *Lake View II*, my opinion was (and still is) that the chancellor erred when she stayed her 1994 orders for two years, and, if Lake View had appealed those orders, it would have been entitled to the injunctive relief it sought. As far as the acts the General Assembly enacted after 1994 in its effort to comply with the chancellor's decisions, Lake View and any other school district had the opportunity to challenge the validity of those acts in another suit. Clearly, those acts involved new and different issues to be argued and decided.

Instead, our court adopted a new review procedure and has provided for "compliance trials" in order to consider the constitutionality of any laws enacted since Chancellor Imber's 1994 orders. This court's action in this respect was well intentioned to provide a helpful hand in its attempt to rectify serious issues surrounding the funding problems facing our state's schools. These issues, however, could have been appropriately dealt with if this court had required the parties to follow this court's existing rules of procedure, appellate rules, and its case law interpreting those rules. I discussed this subject in my earlier dissent, and there is no need to rehash that dissenting opinion here, except to say that when this court strays from its established rules and laws to create new remedies to resolve hard and controversial issues, it invariably makes matters worse. *See, e.g., Republican Party of Arkansas v. Kilgore*, 350 Ark. ____, ____ S.W.3d ____ (November 7, 2002) (Glaze, Corbin, and Imber, JJ., dissenting).

Because of this court's unusual decision to allow the chancellor's 1994 order to be held in abeyance for two years, matters changed afterwards -- Arkansas voters approved Amendment 74, and the General Assembly enacted acts bearing on the state's school funding problems and raising new issues. Because this court did not correctly conclude the litigation over which Chancellor Imber presided, our court now is confronted with the question of which findings and

decision it is to review, since new laws have surfaced after the 1994 orders, and a new judge, Collins Kilgore, has been assigned to decide the Lake View case. This issue as to what this court should review is most perplexing, and, once again, would not have existed if our court had ended its review of Judge Imber's 1994 orders, by denoting those orders final and deciding the issues in that appeal. Alas, the court's failure to do so now forces this court to choose whether it should review Judge Imber's or Judge Kilgore's orders. The majority court has decided Judge Kilgore's findings and order are now the ones before this court. The majority court submits that Judge Imber's case has officially ended, and Judge Kilgore's order springs forth for review, even though ordinarily any final order brought on appeal brings up for review any intermediate order involving the merits. *See* Ark. R. App. P.--Civ. 2(b).

While I thoroughly disagree with the new and unusual manner in which this court has taken jurisdiction of this case on appeal, I recognize I am outnumbered. However, I am hopeful that sometime in the near future this court will revert to its rules and require trial courts to decide constitutional questions and not allow those courts to hold their decisions in abeyance, thus requiring later "compliance hearings." We have rules and remedies, as well as legislative options, to enforce such constitutional mandates, and our court need not create new ones.

Regarding the merits of this case, I largely agree with the majority court. For example, the majority, I believe, correctly holds that courts have the authority to decide the constitutionality of the State's school funding system. Our court essentially decided that question in the case of *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983). I also am of the view that the lower court's decisions, and our court's decision on appeal, are correct in ruling that the State's school-funding system is unconstitutional and inadequate under Article 14 of the Arkansas Constitution. While the argument is strong that this court should proclaim an adequate education to be a fundamental right, such a proclamation would add very little to the opinion, since the majority opinion clearly recognizes and mandates that the State has an *absolute duty* under our constitution to provide an adequate education to each school child.

Finally, I also agree with the majority decision regarding the award of attorneys' fees, only because the State waived sovereign immunity in this case. Otherwise, Lake View would not be entitled to any attorneys' fees since attorneys' fees are authorized in only two situations: (1) when fees are provided by statute (commonly labeled the "American Rule"), and (2) in illegal-exaction cases where a class action is sought and a common fund is established. *See Cotten v. Fooks*, 346 Ark. 130, 55 S.W.3d 290 (2001) (Glaze and Hannah, JJ., concurring) (where court refused to award fees because there was no common fund from which such fees could be paid); *but see Lake View School Dist. No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000) (Glaze, J., dissenting).

Here, no refund exists, but the State affirmatively recognized that Lake View's counsel were entitled to attorneys' fees, even though no statute provides for them. In these limited circumstances where the State waived its immunity, the majority court was correct in awarding fees, and, in doing so, utilizing the established factors set out in *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

In conclusion, I must disagree with the majority opinion where it stays the issuance of the court's mandate until January 1, 2004, so as to give the General Assembly and the Department of Education time to implement appropriate changes. The opinion further reads that "[W]ere we not to stay our mandate in this case, every dollar spent on public education in Arkansas would be constitutionally suspect." The majority court tends to raise alarm where none exists, nor is argued.

Our established appellate rules provide that in all cases, civil and criminal, the clerk will issue a mandate when the court's decision becomes final. *See* Ark. Sup. Ct. R. 5-3(a). Rule 5-3(c) provides for a stay only where parties seek to prosecute proceedings to the Supreme Court of the United States.

In short, this court should follow its own rules. The General Assembly meets beginning in January of 2003, and I have every confidence that governmental body, the governor, and the executive branch will work towards assuring the citizens a school system that will meet constitutional muster.

Part of the delay in obtaining a decision in this case has been due to this court staying its orders. This court should let the judicial, legislative, and executive systems move ahead as it usually does in these matters, and Arkansas can put this constitutional issue behind it. Accordingly, I join in the majority decision to affirm in part and reverse in part, but do not join in staying this court's decision until January 1, 2004.

**IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SECOND DIVISION**

**LAKE VIEW SCHOOL DISTRICT, NO. 25
OF PHILLIPS COUNTY, ET AL. PLAINTIFFS**

VS. NO. 1992-5318

**MIKE HUCKABEE, GOVERNOR OF
THE STATE OF ARKANSAS, ET AL.
DEFENDANTS**

FINAL ORDER

The school funding system now in place in the State of Arkansas is inequitable and inadequate under Article 14, § 1, and Article 2, §§ 2, 3 and 18 of the Arkansas Constitution.

I. INTRODUCTION

This case dates to 1992 and its long history is recounted in *Lake View School District No. 25 of Phillips County, Arkansas, et al v. Mike Huckabee, Governor of the State of Arkansas, et al*, 340 Ark. 481, 10 S.W.3d 892 (Ark. 2000). In summary, the 1994 Order issued by Judge Annabelle Imber found the Arkansas School Funding System inequitable under Article 2, §§2, 3, and 18 and Article 14, § 1 of the Arkansas Constitution. The 1994 Order stayed the effect of the decision for two (2) years to give the State time to enact and implement appropriate legislation in conformity with her Opinion. The appeal of the 1994 Order was dismissed because the order was not final as it contained the two year stay. After the Plaintiffs pursued their case it was dismissed by this court by order of August 17, 1998, as moot because of constitutional and statutory changes since the 1994 Order. The 1998 Order was appealed and resulted in the *Lake View* opinion as cited above. The Supreme Court wrote "Surely Amendment 74, which allows funding variances among school districts due to local taxes, does not by itself resolve disparities in per pupil expenditures and opportunities under the State Constitution's equal protection clauses...

"We believe that a compliance trial and decision by the chancery court on whether the disparities in treatment noted in the 1994 order have been corrected so as to pass

constitutional muster is the best way to achieve those goals...." The Court directed that "trial should take place as soon as possible". The trial then took place beginning September 18, 2000, and ending November 1, 2000, although all days were not used for this case.

During the summer of 2000, another 144 school districts attempted to intervene bringing to 188 the number of districts in support of the State Defendants and the present funding system. This intervention was subsequently denied by the court.

Separate from this lawsuit, Plaintiffs filed another lawsuit in the Chancery Court of Pulaski County generally known as *Lake View II*, a/k/a *Lake View School District vs. Mike Huckabee, O.T. 1999-875.* The issue in *Lake View II* was whether the State of Arkansas provides a constitutionally *adequate* education system. However, as will be seen below, this court ruled that the adequacy issue was already properly before the court.

The court held a pre-trial hearing on September 8, 2000, before the trial scheduled September 18, 2000. At this hearing Plaintiffs moved to non-suit *Lake View II* rather than consolidate it with this case. The court accepted the oral motion of the Plaintiffs and granted the non-suit.

While other matters were addressed to dispose of outstanding motions, the court addressed the scope of the trial and particularly the 1994 Order of Judge Imber with specific attention to Conclusions of Law Numbers 9 and 16. Conclusion of Law No. 9 states as follows:

> While Arkansas has not defined the terms "general, suitable, and efficient", courts in other states have defined these terms. In *Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 191-192 (Ky. 1989)* the Court defined "efficient" as a system which required "substantial uniformity, substantial equality of financial resources and substantial equal educational opportunity for all students" and which required that the educational system be "adequate, uniform and unitary." Id. at 192.

The Court concluded that "an 'efficient' system of common schools should have several elements:

1. The system is the sole responsibility of the General Assembly.

2. The tax effort should be evenly spread.

3. The system must provide the necessary resources throughout the state –they must be uniform.

4. The system must provide an adequate education.

5. The system must be properly managed." Id. at 211.

The Court went on to say that "an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

(i)sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
(ii)sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
iii)sufficient understanding of governmental processes enable the student to understand the issues that affect his or her community, state, and nation;
(iv)sufficient self-knowledge and knowledge of his or her mental and physical wellness;
(v)sufficient grounding in the arts to enable each student to appreciate his or her cultural and
historical heritage;
(vi)sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(vii)sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market. Id. at 212. See also *Pauley v. Kelly*, 255 S.W.2d 859 (W.V.1979).

And Conclusion of Law No. 16 reads as follows:

The Arkansas school funding system violates Article 14, Section 1 of the Arkansas Constitution by failing to provide a "general, suitable and efficient system of free public schools." See *DuPree v. Alma School Dist. No. 30,* Ark. 340 (1983).The apparent reason these two Conclusions were articulated in the 1994 Order was that the court felt the adequacy issue had been properly pled and addressed by the evidence and statements of counsel at the trial, and was ready for a decision. Therefore, this court ordered on September 13, 2000, that both the equity, sometimes known as the funding issue, and the adequacy issues would be heard in the compliance hearing.

On November 18, 1996, the court ordered in part as follows:

4. The enactment of a new school funding system and new statistical data constitute new facts. Therefore, the doctrine of the law of the case is not applicable, and the scope of the trial will not be limited to those issues raised at the previous trial of this cause. Nor will the trial be limited to compliance with this Court's previous order.

5. The scope of the trial will be affected and controlled by the pleadings file (sic) by the parties in this cause.

Judge Imber adopted the standard in *Rose* as the definition for "general, suitable and efficient." This court adopts that same standard and in the September 13, 2000, order ruled that strict scrutiny would be the standard by which compliance would be measured. In the September order, this court observed:

11. The Constitution in Article 14 uses the language "*intelligence* and virtue being *safeguards of liberty* and the *bulwark of a free and good* government." (Emphasis added).

The force of these words clearly indicates that the Constitution gives a value of the highest priority to a suitable education for Arkansas citizens. The words used are both consistent with and supportive of the proposition that Arkansas has a compelling interest in having an educated electorate to ensure a "free and good government . . . (and) shall *ever* maintain a general, suitable and efficient (school) system . . . and *shall adopt all suitable means* to secure to the people the advantages and opportunities of education." (Emphasis added).

12. If speech is uninformed, what purposes can it serve? The free exchange of ideas that underlies the most cherished concepts of our culture has value to the extent that the exchange is well grounded in relevant information and analytical skills. Education provides these.

13. The simplest and clearest construction to put on Conclusions 9 and 16 in the 1994 Order is that under the standards enunciated in *Rose*, as well as the Arkansas Constitution, Arkansas public schools did not meet constitutional requirements for adequacy at the time of the 1994 Orders.

14. Therefore, equity (i.e. funding) and adequacy issues will be heard at the compliance hearing. These are the questions of whether the present system of public schools and the financing thereof complies with the constitution. The State of Arkansas has a compelling interest in having an educated electorate, and therefore, strict scrutiny will be measured.

In addition to the findings of the September 13, 2000, order, it should be noted that the language of Article 14 is at least as compelling as the language of the Constitution's Declaration of Rights which protects our fundamental rights and freedoms, among them freedom and independence, equality before the law, right to bear arms, liberty of press and speech, right to jury trial, etc.

The September 13, 2000, order superseded Paragraph 3 of the court's November 18, 1996 order and put the burden of going forward on the State Defendants.

As the Supreme Court said in *Dupree* : "...[W]e believe the right to equal educational opportunity is basic to

our society. 'It is the very essence and foundation of a civilized culture: it is the cohesive element that binds the fabric of our society together.' (citation omitted) Education becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights."

Pending before this court are the Plaintiffs' Fourth Amended Complaint, the Plaintiffs' Petition to Show Cause filed November 21, 1997, Plaintiffs' Petition for Attorney Fees filed February 2, 1998, Amendment of and Supplement to Petition for Award of Attorneys Fees and Costs filed September 19, 2000, Revised and Restated Amendment of and Supplement to Petition for Award of Attorneys Fees and Reimbursement of Costs filed September 19, 2000, Cross-Complaint filed by Rogers and Bentonville Intervenors on September 22, 2000, Rogers and Bentonville Intervenors Motion for Court Appointment of Expert Witness filed September 26, 2000, State Defendants' Motion to Dismiss Cross Complaint filed October 16, 2000, First Amended Cross Complaint filed by Rogers and Bentonville Intervenors on October 23, 2000, Plaintiffs' Motion for Entry of Order on Attorneys' Fees filed February 2, 2001, Plaintiffs' Renewed Motion for Injunction and Sequestration of Funds filed February 2, 2001, and the Alma Intervenors' Motion to Strike Plaintiffs' Response to Alma Intervenors Proposed Findings of Fact filed March 23, 2001.

With this background, the court considers the evidence and the applicable law in forming its findings and conclusions.

II. CONTENTIONS OF THE PARTIES

The Defendants' position is that the passage of Amendment 74 and subsequent legislation cured any inequities in distributing available funds for public school education in Arkansas. The Plaintiffs' position is that grave constitutional inequities still exist. Alma Intervenors agree with the Defendants. Bentonville-Rogers, Little Rock and Pulaski County Intervenors agree with the Defendants as to the equity of distribution of funds but side with the Plaintiffs as to the inadequacy of the funding of the educational system.

A large part of the disagreement between the State

Defendants and Intervenors on one side and the Plaintiffs on the other concerns the calculation of a formula known as the Federal Range Ratio. At the trial in 1994, components of the ratio calculation included a concept known as "weighted average daily membership" (explained below at p. 9), and monies received by the Pulaski County school districts as part of their desegregation efforts. Also, at the trial in 2000, Defendants argued that the use of revenues was more appropriate than the use of expenditures in calculating the Federal Range Ratio; that the law had changed and weighted average daily membership no longer applied; and that the 1994 Order erroneously ordered the inclusion of the desegregation monies in the Federal Range Ratio calculation.

Furthermore, Plaintiffs argue that the State Defendants neglect their constitutional duty to provide sufficient capital improvements for the various school districts and as a result the various school districts have deteriorating physical plants and inadequate funding to upgrade facilities already in place. State Defendants argue the State has provided an equitable funding formula, and that disparities and shortcomings among individual school districts may be accounted for by mismanagement at the local level.

III. FINDINGS OF FACT

A. Equity

1. The 1994 Order directed the Defendant the State of Arkansas to eliminate disparities in its public education system. There are problems, however. In the trial conducted in November, 1994, and the subsequent order, the parties and the court relied on the Federal Range Ratio, and, to a lesser extent, on two other concepts, the Coefficient of Variation and the GINI Index of Inequality. All of these assist in mathematically determining if any variances in the distribution of funds by the State to the school districts are constitutionally acceptable.

2. The Federal Range Ratio is found in the Code of Federal Regulations (CFR). To determine the variance in funds received in the restricted range of distribution between the school district that receives the least funding and the

school district that receives the most funding, the CFR requirements can be satisfied by either the use of *revenues* provided to the districts by the State or the amounts of actual *expenditures* by the school districts. 34 C.F.R. §222.60. In the 1994 trial, the court and the parties calculated the Federal Range Ratio using expenditures. Today, the State Defendants and the Intervenors argue that revenues should be used in the calculation because revenue figures from the State are more accurate than expenditure figures provided by the school districts. An analysis of the Federal Range Ratio using revenues shows the State to be in compliance with the 1994 Order. Use of expenditures shows the State not to be in compliance. On remanding the case the Supreme Court specifically referred to per pupil "expenditures" in stating, "...Amendment 74, which allows funding variances among school districts due to local taxes, does not by itself resolve disparities in per pupil *expenditures* and opportunities under the State Constitution's equal protection clauses. Correcting such disparities lay at the heart of the 1994 Order. [Emphasis added] *See also DuPree v. Alma School Dist. No. 30, supra.*" *Lake View* at 493.

3. Making an accurate determination as to how much of the revenues distributed by the State actually reach the classroom is more difficult than measuring how much revenue the State provides the schools and school districts. However, under the Constitution the State is solely responsible for the education of its citizens. Its duty does not end upon disbursement of revenues to the school districts. Moreover, the best measure of whether available funds are being efficiently applied to the education of the State's children is by an accurate accounting of expenditures.

4. Another question in 1994 was whether the Federal Range Ratio should be calculated in terms of ADA/ADM or WADM. ADA is average daily attendance, or the average number of students that actually attend school on a daily basis. ADM is average daily membership, or the average number of students that are enrolled in school on any given day. WADM is weighted average daily membership. The concept of weights has to do with special costs incurred in educating certain students (e.g., students with learning disabilities, students for whom English is a second language, students that live in scarcely populated areas and require extra

transportation costs to and from school, etc.) A school district with a greater WADM (i.e., with more special cost students) would receive more money than a school district with a lesser WADM. In the 1994 Order, as amended, the court found a Finding of Fact 61(a) that in the future the Federal Range Ratio should be analyzed using WADM.

5. However, after the 1995 legislation, a new school funding formula was implemented and weights are no longer used. Some of the money that was distributed under the formula using weights is now included in the more general equalization funding that is distributed to the school districts and some is distributed under the new formula as "categorical funding." The Defendants and the Intervenors contend it is appropriate to eliminate WADM in analyzing the Federal Range Ratio. Plaintiffs disagree.

6. Still another question has to do with desegregation money that is provided to the three Pulaski County school districts (Little Rock, Pulaski County, and North Little Rock). In 1994, the court included the desegregation money in analyzing the Federal Range Ratio. Today, the State Defendants and the Intervenors argue that the desegregation money should not be used in the formula calculation because this is money that is associated with costs that are unique to the recipients and, therefore, including it in the calculation skews the result to the detriment of the three districts. The Plaintiffs take the opposite view; namely that, in the first place the 1994 Order requires the desegregation money be used in the calculation, and, secondly, that failure to do so results in a windfall to the Pulaski County districts in which all other school districts should share.

1. Funding System

7. What follows is a simplified explanation of Arkansas school funding, but it seems sufficient for purposes of these proceedings.

8. After the 1994 Order, legislation was enacted in 1995 and 1997 along with a constitutional amendment in 1997 that changed the school funding formula. (Act 916 of 1995 [later held unconstitutional, see *Barclay v. Melton*, 339 Ark. 362 (1999)]; Act 917 of 1995; Act 1194 of 1995; Amendment 74 to

Article 14, § 1 of the Arkansas Constitution; Act 1307 of 1997 and Act 1361 of 1997). The schools are funded through three major sources of revenue: federal funds which are targeted generally to specific categories of students with specific needs; State monies which are distributed through the State funding formula; and local monies raised primarily through the property tax.

9. Local revenues for school districts depend on local property taxes. Because the local tax is levied according to the value of local property, and because the value of property differs from district to district, the amount of revenues available to the various school districts differs. Amendment 74 establishes "...a uniform rate of ad valorem property tax of twenty-five (25) mills to be levied on the assessed value of all taxable real, personal, and utility property in the state to be used *solely* for maintenance and operation of the schools." (Emphasis added) Excess debt millages may be used for maintenance and operation, and thereby, school districts are allowed to obtain the uniform rate of 25 mills using debt service millages rather than millages set aside strictly for maintenance and operations. A.C.A. §26-80-201et seq.

10. The State has determined that the constitution requires it to equalize wealth (with some variances) among the school districts. This is accomplished with State equalization aid.

11. Under the current funding formula, a school district's wealth is first determined based upon the assessed value of property within that district. The assessed value is multiplied by ninety-eight percent and then that amount is multiplied by twenty-five mills. That number is then divided by the average daily membership (ADM) of the district. A.C.A. §26-80-204(4) and (10). This formula yields the "local resource rate." The State then calculates "base level revenue" which is the total amount of money that any one student should generate based on State and local funds. (That figure is determined by adding all State and local funds available to all public schools in the State and dividing by the number of children.) At the time of trial, that amount was approximately $4500. If the local resource rate is three hundred dollars per student, then the State supplements that district with forty-

two hundred dollars per student to ensure equitable funding among the State's school districts.

12. Any school district that has a local resource rate which is less than the base level revenue is given equalization aid to bring it to the base level. A.C.A. §26-80-201(4)(b)(1 thru 3). A district that is able to raise revenues equal to or in excess of the base level may receive no State equalization aid. In fact, under some circumstances, a school district that raises too much money may, because of Amendment 59, have to "roll back" its millages, thereby forcing it to spend less on its children's education than its patrons are willing to provide

13. In addition to the equalization money, "additional base funding" is used as a guarantee program that all school districts will have a minimum State and local revenue per average daily membership that is at least eighty percent of the State and local revenue of the school district at the ninety-fifth percentile (i.e.; ranking all school districts from the richest to the poorest, one eliminates the five richest and finds the district at the ninety-fifth percentile.)

14. After WADM was eliminated, various categories of special cost students were merged into State equalization aid but the State recognized that additional money would still be necessary for other special cost students. This additional money is called "categorical funding". Categorical funding is provided outside the formula. Some of the categories are poverty funding (for schools that have 75% of its children in kindergarten and first grade that are on the federal free and reduced lunch program), gifted and talented, alternative learning, isolated funding, etc.

15. The present school funding formula has three methods to provide school districts with money for capital expenditures, including construction of new buildings. They are Growth Facilities Funding, General Facilities Funding, and the Debt Service Funding Supplement. Growth Facilities Funding, which is in its last year, is to assist districts with growing student populations in building new facilities and acquiring new equipment.

16. General Facilities Funding is formula-driven based on the wealth of a school district. Those funds are used

for purchases of buses, computers, facility repairs and maintenance, etc.

17. The Debt Service Funding Supplement supplements debt payments to a district based on the wealth of the district. Less wealthy districts who are able to borrow money receive a larger supplement than richer districts.

18. Even with these three programs, some districts cannot afford to build new buildings, complete necessary repairs or buy buses. Either the money is not available through General Facilities or Growth Facilities Funding or the district is too poor to incur sufficient debt to finance new construction and take advantage of the Debt Service Funding Supplement. The State Defendant does not believe it has an obligation to provide any further funds to schools or school districts that cannot properly fund its capital improvements.

19. Federal funds are distributed outside State equalization aid. Generally school districts have no discretion as to how they are spent.

20. The purpose of the three formulas (Federal Range Ratio, Coefficient of Variation and GINI Index of Inequality) is to aid in analyzing disparities in funding for schools, school districts and students. But the question, as framed by the Supreme Court, is do unconstitutional disparities exist? Does the state fulfill its constitutional duty to provide each of its children an education adequate to give the child the opportunity to realize his potential, enrich his life and be an asset to his community? The formulas do not provide an exclusive way to answer the questions (Greene, Def. Ex. 68, fn 1)

21. Using expenditures in the calculation of the Federal Range Ratio, this court finds that there is more than a 25% difference between the 5th and the 95th percentile in amount spent per pupil which is not in compliance with the 1994 Order. However, using revenues, the State is within the 25% range differential. Using expenditures in the Coefficient of Variation, the State is not in compliance. Using expenditures in the calculation of the GINI Index of Inequality, the State is in compliance.

2. Comparison of Schools and School Districts

22. Facilities, materials, teachers and other resources affect a student's opportunity and ability to learn. The State suggests that disparity in the way funds are spent accounts for the many alleged inequities at the local level; i.e., mismanagement and not inequitable distributions of funds is the cause of unconstitutional educational disparities. There is some evidence of mismanagement at the local level, but it is not sufficient to fully support the State's position. Further, even if it were, under the Constitution, the State bears the ultimate burden of educating its children, no matter where the blame is cast.

23. Because wealthy school districts are able to provide more educational resources than poor districts all students in Arkansas do not have an equal opportunity to learn. Lake View provides an example of the limitations of a poor school district. Lake View has a relatively low student/teacher ratio. Ninety-four percent of students at Lake View are on free or reduced lunches. Lake View has one uncertified mathematics teacher for all high school mathematics courses: pre-algebra, algebra I and II, geometry and trigonometry. Calculus is available through distance learning. The mathematics teacher is paid $10,000 a year as a substitute teacher which he supplements with $5,000 annually for school bus driving.

24. The mathematics teacher, Roy King, teaches a trigonometry course with a Prentice Hall textbook that is a graphing calculator supported program. The calculators are expensive. There are ten students and four calculators. His classroom has two electrical outlets to support such conventional needs as overhead projectors, computers, lights and other electrical equipment. In his geometry class he does not have compasses. Only one of four chalkboards is useable. His computer lacks hard and software, it has no sound chip, and the printer does not work. Paper is in short supply and the duplicating machine, an addressograph, is generally overworked so that frequently documents, including examinations, have to be handwritten on the chalkboard.

25. Lake View has a basketball team but no

uniforms for all of the players. There are no other organized competitive sports teams at the school. The band does not have uniforms.

26. The attendance rate at Lake View is 99.05 percent, the graduation rate is 94.7 percent and the dropout rate is only two percent; all better than the State average. The college rededication rate (explained below) is 100 percent; more than twice the State average.

27. The Holly Grove School District offers only the basic curriculum required by the State for graduation. There are no advanced courses or programs offered. The starting salary for a Holly Grove teacher is the State minimum, approximately $21,000.00. Teachers are continually lured away to other districts that pay more.

28. In Holly Grove, science laboratories are in need of updated equipment. Computers need replacing. The bus fleet is old and includes three diesel buses but the remainder are gasoline operated and very expensive to operate. The heating and air conditioning systems are outdated and in need of repair or replacement.

29. Paragraph seventy-three of the 1994 Order finds that the physical plant at Holly Grove is in need of repair to leaking roofs, restrooms, leaking gas line, and a falling library roof. Since the Order, only the gas line and library roof have been repaired.

30. Holly Grove recently increased its millage from twenty-eight to thirty-two mills. However, because of political considerations, millage increases are hard to win in the district. In order to raise money for repairs, other needs, and generally to make ends meet, Holly Grove, has to borrow against its next year's income.

31. Barton Elementary in Phillips County has two bathrooms with a combined number of four stalls for over one hundred children in one of its buildings.

32. Lee County Schools went two years without a band program due to lack of funds. Lee County does not offer any advanced placement courses. Required courses are being

taught in the Lee County District but suffer from a lack of funds. The science laboratories have little or no equipment. There are approximately thirty computers for six hundred students. The bus fleet of twenty-six buses has only five that meet State requirements, and the buildings need extensive repairs.

33. The Lee County School District has been unable to get voter approval of a millage increase in the past eight to ten years. Over the past ten years Lee County has experienced a decreasing enrollment. Financial support from the business community goes mostly to private schools.

34. By way of comparison, Fort Smith School District has over forty-five percent of students that qualify for free and reduced lunches. Out of twenty elementary school campuses, ten qualify under the Poverty Index criteria which means that there are between seventy and one hundred percent of the students qualifying for free or reduced lunches. Several more elementary schools fall between fifty and seventy percent free and reduced lunches. Fort Smith has a higher student/teacher ratio than Lake View with forty percent more students per teacher. The Fort Smith curriculum includes classes on drafting and design, machine II technology, furniture manufacturing, electronics and electricity, band, orchestra, advanced girls' chorus, gifted and talented programs with honors courses, German, Spanish, French, fashion merchandising and marketing. Fort Smith also offers the basic curriculum required by the State.

3. Capital Needs

35. The Director of the Arkansas Department of Education does not believe that it is fair that a child that lives in a property poor district should be in substandard facilities. That is the situation that existed in the State in 1994 and it still exists today.

36. A school district not able to afford a building necessary to meet accreditation standards could face academic or fiscal distress resulting in probation or takeover by the State. However, the Director of the education department does not believe it is the State's obligation to provide any assistance in addition to that being provided to relieve the

various school districts.

37. School buildings throughout the State need repairing and updating if not replacing. Some districts in faster growing areas of the State need additional buildings. The physical plant problems are particularly acute in Eastern Arkansas. They include poor heating and air conditioning systems, broken and missing windows, missing floor tiles and walls in need of repair. As Roy King of Lake View observed, it is hard to convince a child that education is important when the school facilities are so poor. The cost per student to construct a new school building is between $8,000 and $10,000.

38. Throughout the Lee County School District buildings have leaking roofs, asbestos problems, and some have little or no heating and air conditioning. Ceiling tiles are missing and molded. The Holly Grove capital funding requirements and its problems meeting them have been noted above.

39. The Debt Service Funding Supplement is intended to assist schools which have incurred debt intended to be paid through revenues from increased millages. Thus poor school districts (e.g., Lake View, Holly Grove, Lee County) that have not been able to borrow because the voters would not approve the debt millages or because, even if the millages were approved, the property value of the district is so low that insufficient capital could be raised to build or repair buildings, may not qualify for the debt service funding supplement or find the supplement insufficient to meet their capital requirements. That is, the amount of the debt service funding supplement for which a district can qualify depends on how much debt the district can incur, and poor districts simply cannot incur the debt available to a richer district.

40. The Revolving Loan Fund does not provide much help to the Holly Grove School District because the fund aid must be repaid out of next year's State aid. Holly Grove cannot utilize the Revolving Loan Fund because any aid it receives from the fund will be withheld from its next year's State aid. The district will continually go into deeper debt.

41. Revenues for school districts are necessary for day to day maintenance and operation. There is little if any

surplus for capital expenditures. This hand-to-mouth existence particularly exacerbates the conditions in school districts where facilities have suffered from years of neglect.

42. The Rogers School District millage is above the State average at 33.5. Rogers has to regularly go into debt to keep pace with its rapidly growing population. Money spent on refinancing and debt service is diverted from educating children.

43. If the definition of a wealthy district is based upon assessed value per student, Rogers is an above average or a wealthy district. There is not a correlation between a district being above average in wealth and being above average in expenditures per student. For example, Lake View spends more money per student than Rogers even though Rogers is considered wealthy and Lake View is considered poor.

B. Adequacy

44. The Court will preface this section with an observation based on the evidence but not directly addressed at trial: Large scale education is an extremely complex process with many components. As with many projects that result in mass production, the temptation to standardize the process can be irresistible. However, in education many of the parts defy standardization; namely the individual students, teachers, staff and administrators, as well as, in many cases, the subject matter. Because these components resist standardization, and because of technological advances and ongoing efforts to improve our schools, the process appears to be in a permanent state of change which makes the search for solutions to the money problem noted here even more difficult.

45. Students are staying in school longer. That means that many more students who require special attention are also staying in school longer and putting a heavier burden on available resources. Yet, while the law demands more of the schools, the percentage of the State budget available for schools has decreased. Cultural and demographic changes, new technologies, new standards for student achievement and accountability of teachers and administrators are all

contributors to the accelerating demands and complications of public education.

46. There is no one universally accepted definition of an adequate education. However, there is a harmony among all suggested definitions. The court has already adopted the *Rose* factors as the requirements for an adequate education in Arkansas. Other definitions will emerge. All of them are useful in discussing this difficult topic.

1. Financial Adequacy

47. In education finance terms, "adequate" is defined as an amount of revenue per pupil enabling a student to acquire knowledge and skills necessary to participate productively in society and to lead a fulfilling life. The dollar amount that is "adequate" is a function of many variables, including specified levels of skill and knowledge, purchasing power of a dollar in a given locality, characteristics of students and other factors such as population sparsity and school size.

48. There are three elements for an adequate education system. First, the State must clearly specify what its expectations of student achievement are. Second, there must be an effective accountability system that holds the schools accountable for results. Third, the State must provide adequate funding to allow a program to be developed that will produce the expected outcomes. Arkansas has two of those three elements in place: the curriculum frameworks that specifies student expectations and the accountability system

49. The State bears the responsibility to ensure adequate funding for all students. It may not permit a local district to underfund its portion of that obligation. The State Board of Education spends whatever money is in its budget and no study has been done to determine whether the money budgeted for education is enough to pay for education in the State of Arkansas. The 1994 Order included Finding of Fact number 132:

> There have been no studies to show how much
>
> it costs per pupil to provide a "general, suitable

> and efficient" educational opportunity to Arkansas schools. The amount of money spent on a student's education in Arkansas is directly related to the amount of money available to be spent.

50. A report on the school funding formula concluded that currently in Arkansas the initial level of funding, the base local revenue per student, is based on available revenue and is not related to achieving an adequate education. (Trial Transcript p. 242) The Chairman and some members of the State Board of Education do not believe that education funding is adequate to educate the children of Arkansas.

51. Even though one of the statutes enacted since the 1994 Order (See ACA §6-20-301 *ff*, A.C.R.C. Notes regarding Act 917 of 1995) required that a committee be formed to produce a report to the Department of Education or Education Committees in the Senate and House on the question of adequacy, one was never done. [Simon, Gordy]

52. The Educational Excellence Trust Fund was established in 1991 and was intended to supplement monies already being utilized for education. It is not governed by the Revenue Stabilization Act but rather there is a separate process that allocates the money from the trust fund. That is, it was intended to be an addition to State funding, and not in place of it. When it was created in 1991, approximately 50% of the State's budget was devoted to education. However, the percentage of the State budget being devoted to education and subject to revenue stabilization has gone down since the creation of the Educational Excellence Trust Fund. Now, the combination of the trust fund and the money allocated from the State roughly equal the percentage of state funding being spent prior to the creation of the trust fund. The purpose of the Educational Excellence Trust Fund has been defeated.

53. One of the specific responsibilities of the Director of the Department of Education is to recommend the funding formula allocation, the biennial operating budget, and the Department of Education budget to the Governor and the State Board for approval. The Governor's office requested the Director to maintain the 1999 budget within a limited

percentage increase over the previous biennium.

54. An agency budget and appropriation are not the same things. An appropriation is simply the authority to spend the money if it is available. An agency's budget is based on the available funding. It is possible to have appropriation authority to spend far in excess of the actual funding available. The Department of Education has the authority to loan school districts funds, primarily for buses and small construction projects.

55. The Department of Education provides catastrophic funding for any school district faced with a high cost student, i.e., a student costing more than Thirty Thousand Dollars to educate. Special education is funded through a combination of state and local aid, various line item appropriations from the State and federal funds. This means that the only categorical funds going out for special education are to those districts that have a high cost student as defined above. Money for special education is otherwise included in the equalization aid under the new formula.

56. The poverty index is derived from the number of students who qualify for the federal free and reduced lunch program. Generally, children who qualify for free and reduced lunches come from homes that cannot provide opportunities such as internet access, ample reading and writing supplies, and parents who emphasize the importance of education and reading at an early age. A heavy concentration of free and reduced lunch students placed in one classroom over-taxes the teacher and puts a strain on available resources. These students typically require extraordinary resources to help them achieve proficiency. The poverty index funds in Arkansas assist only those children in kindergarten and first grade.

2. Educational Adequacy

57. One must look to more than the question of how much money is spent on the education system in determining whether it is adequate. The determination of whether a state's funding system is adequate is only part of the adequacy effort.

58. A measure of adequacy is performance. The following statistics were put into evidence and are found to be accurate:

1) Arkansas ranks at number 50 among the states in per capita state and local government expenditures for elementary and secondary education.

2) Arkansas students scored several tenths below the national average on the ACT from 1990 to 1999.

3) Arkansas ranks lower than the national average for percentage of adults ages 25 years and older who have graduated from high school.

4) Arkansas ranks 49th in the nation in percentage of the population age 25 years or older with a bachelor's degree or higher.

5) Arkansas ties for last place in the nation in percentage of adults with graduate degrees.

6) Arkansas' fourth and eighth grade students do not rank at or above the national average for proficiency in math, reading, science or writing as measured by the Southern Regional Education Board's State Analysis of the National Assessment of Education Progress (NAEP) test scores.

7) Arkansas ranks 49th among the states for median household income.

8) Arkansas ranked 48th in the nation in 1998 on spending per student.

9) On the ACT test in English, Arkansas students exceed the national average.

10) For the period 1996 through 1998, the percentage of Arkansas high school graduates

attending college is approximately 53%.

11) The first set of scores on the ACTAAP test showed that only 44% of the fourth graders were proficient in reading and only 34% of the students were proficient in math.

12) In a survey published in "Education Week", Arkansas received an F on the adequacy indicator and a C on the equitable division indicator. (Transcript p. 1386)

13) In the 1996-97 school year, the last year comparable figures are available for the entire nation, Arkansas spent $4,535 in operating funds per pupil. The national per pupil spending average was $5,923. Although there

does not exist a thoroughly accurate way of adjusting for differences in cost of education because some school districts are located in communities with higher costs of living, it is clear that Arkansas' costs are not fully 25%

lower than the nation as a whole.

14) Arkansas generally ranks between 48th and 50th in teacher pay.

3. ACTAAP

59. The Arkansas Comprehensive Testing and Accountability Program (ACTAAP) is the blueprint for education in Arkansas. It was created after educators, legislators, the executive branch and general public determined what is necessary to properly support schools and educate children. Before ACTAAP was adopted, education programs in the State were largely disjointed efforts by a number of entities. There are four purposes of ACTAAP: improve student learning and classroom instruction; establish accountability; provide evaluation; and assist policymakers in decisions regarding how to accomplish the other three goals.

60. "Frameworks" are a part of ACTAAP.

Frameworks are a general statement of the knowledge that students should achieve. There are frameworks for every grade, kindergarten through eight, and then selected frameworks for courses in high school. The purpose of a framework is to make sure that a child can demonstrate proficiency in meeting a specified standard for a particular grade or subject.

61. The frameworks define content standards by discipline at grades four, eight and twelve in different areas, including English Language Arts, Reading, Mathematics, Science, Foreign Language, Social Studies, Health, History, Physical Education, Visual Arts, and Music and Performing Arts. (State Defendant's Exhibit 5) They are intended to be a guide to development of local curriculum instruction and assessment in all public schools. The State Department assists in offering advice and counsel to the school districts in creating a curriculum. This service is provided without charge.

62. The rules and regulations adopted by the State Board require that all teachers have a minimum of 30 hours of professional development annually to assist in accomplishing the ACTAAP mission.

63. There are two types of tests to measure whether students are at grade level under the State's standards: the Criterion Reference Test, also known as the Benchmark Test, and the Norm Reference Test. A Criterion Reference Test is customized to individual states. It does not compare one student against another. It measures whether the student meets the standards that the State has set for the relevant grade (fourth, sixth and eighth). ACTAAP largely depends on the Criterion Reference Test as a measuring stick.

64. A Norm Reference Test is a test that measures how well a student does on an examination compared with every other child in the testing group that took it. In Arkansas, the Norm Reference Test used is called the SAT-9. When that test is graded, the child's score is listed as a percentile. If a child receives a score of the 65th percentile, that child did as well as 65% of the students that took the exam. The Norm Reference Tests are required at grades five, seven and ten.

65. ACTAAP requires all schools to test their students at the fourth, sixth and eighth grade and, for certain subjects, at "end of course". For example, when a student completes a course of Algebra 1, regardless of grade, that student would be tested. Performance levels are descriptions of student performance on the Criterion Reference tests. There are four levels: advanced, proficient, basic and below basic. The State requires a proficient rating, which means that children not only possess substantial knowledge and skills in the content area but that they be able to apply and use those skills.

66. Under ACTAAP, it is not enough to have only a basic knowledge of facts but proficiency in applying the facts and developing higher order thinking skills must be achieved. This is a higher standard than has been accepted in the past. ACTAAP sets goals that may not be met. Although ACTAAP has as its goal that children will be proficient in reading, writing and mathematics at grade level, that goal has not been reached. However, ACTAAP will not be fully implemented until calendar years 2003 and 2004. Plus, there are no guarantees that ACTAAP will remain as part of the State's education policy as executive and legislative branches of the government change.

67. Smart Start is the kindergarten through fourth grade component of ACTAAP. It is the component being stressed the most because a child must begin to learn early and correct academic deficiencies to have any realistic chance of being successful in later grades. Even though students are identified in the first or second grade as needing extra help, in many cases the efforts to bring them up to grade level are unsuccessful. Those students continue to fall further behind year after year. If a student is not on grade level, and especially reading by the third grade, chances are the child will never catch up. Significant intervention is required. Rededication is absolutely necessary. Unless the student qualifies for some specially designated program, the school district does not have sufficient funds for rededication.

68. The primary monies used for training in Smart Start are line item budgets within the Public School Fund which are administered through the Department of Education. They are not funds sent directly to the schools.

4. The Schools

69. As part of ACTAAP the Holly Grove School District, like all districts, is required to have an individual improvement plan for each child in the fourth grade that does not perform at a proficient level. The district receives no extra money to help implement an individual improvement plan. Most of the parents at Holly Grove are former Holly Grove students. The cycle of Holly Grove's poverty can be broken if the children are better educated.

70. The Fort Smith School District screens every incoming kindergartner in five areas and has found that more than half are at least one year behind in two areas, and about 25 or 30 percent of them are two years behind. Over 45% of students in the Fort Smith School District qualify for free or reduced lunches. Fort Smith uses its Poverty Index Funds exclusively on literacy development at those very youngest years.

71. Rogers Public Schools recognizes the need to provide additional assistance to those students who are identified in the lower quartile on the standardized tests. Unless the student qualifies for some specially designated program such as special education the school district does not have sufficient funds to help the child.

72. In the Rogers Public Schools almost 50% of students are not proficient at grade level in the elementary schools. Yet the school district does not have the funds to provide the individual plans for individual students, including money to pay teachers for additional hours and transportation for students for remedial programs. For the 2000-2001 school year, Rogers had 536 new elementary students, 300 of whom were performing below grade level.

73. A single bus in the Rogers School system will run three times in the morning and three times in the afternoon. Students are required to transfer between buses. Some have to transfer twice. The first students get on the bus at 5:50 a.m. and the last one gets off the bus in the evening at 5:00 p.m. Rogers did obtain a grant to work with those middle school students performing below grade level in an after school program. However, half of those students who were

identified as needing the program could not attend because they lived too far away from the school and the school could not provide transportation for them due to lack of funds.

74. Rogers Public Schools incurred approximately $2,100,000 in transportation cost this year. The cost per student is approximately $190 per student, yet the school district receives no State aid for transportation costs.

75. From 1990 to 2000, enrollment in the Rogers School District has increased by approximately 4,300 students. Rogers has therefore had to continuously plan and build classrooms and school buildings in order to accommodate the growth. It has spent over sixty million dollars since 1990 to accomplish this. They have had two millage increases and relied heavily on the Second Lien Bonding authority. Rogers uses the debt millage above the 25 mill uniform rate of tax to pay the debt it owes. It also receives General Facilities Funding and Debt Service Supplement money to use toward the debt. Growth Facilities Funding is no longer available as it was eliminated in legislation in 1999.

76. Rogers must shuttle students from its various attendance zones in order to fill the classrooms to a maximum allowed by State standards. In some instances, their efforts to insure the standards are met causes siblings to be divided. Further, Rogers Public Schools must rely on combination classes in order to achieve maximum efficiency in the space available. Rogers spends approximately $432 per student for debt, which takes away from maintenance and operating expenditures; i.e., money that could be spent in the classroom, more efficient transportation of students, more rededication, or more instructors for other high cost students.

77. In Rogers Public Schools there were 84 students enrolled in English as a Second Language (ESL) program in 1991. In October, 2000, there were 2,615 students enrolled in that program. In fact, 17.4% of the student body in Rogers is ESL. Rogers has 24 ESL teachers and two instructional assistants. It actually needs an additional ten ESL teachers. Although Rogers receives about $743,000 for ESL students, that amount does not cover all the costs of the ESL program. Last year Rogers spent $1,013,000 on the ESL program.

78. The funding from the State for ESL students is done on a proportional basis. There is a pool of money available for ESL education and that money is divided equally among all of the ESL students in the state.

79. There has been an increase in the number of special education students in Rogers Public schools over the last ten years. The number has gone from 500 in 1990 to 1326 in 2000. The school runs short about $3.5 million dollars for special education each year.

80. In Bentonville Public Schools, one student requires a registered nurse in attendance with him at all times. The school district does not receive any money earmarked for medically fragile students.

81. Bentonville has not always had success in passing millage increases. In order to build the new high school, reserve funds and second liens were used. Private fund raising was used to meet construction costs and needs of the district. This is in addition to the $8.2 Million in various grants.

82. Since 1987, enrollment in the Bentonville schools has increased 83.57%. In the last eight years, Bentonville has had to build new middle and elementary schools, renovate an old high school to make it a junior high, and build a new high school. It has gone into over $20 million in debt. The interest on the indebtedness could otherwise be used for teachers' salaries, instructional materials and other educational needs. Debt service has increased by 55.79% in the last three years.

83. Bentonville receives money from the federal government to deal with special education needs, but all of that money and money from other sources for special education does not meet the actual expenses incurred by the district for special education.

84. The Little Rock Public Schools cannot meet the needs of their children with the money it has and yet it has more money per student and in total than any other school district in Arkansas.

5. State Efforts

85. Present technology would suggest that the appropriate way for a state to exercise its responsibilities is not through detailed spending control but close observation of student performance. The Standard Assurance Unit of the Department of Education is available for that role. It has three responsibilities: accreditation of schools, standards review and assistance to schools in academic distress.

86. The Standards of Accreditation were established in 1983, and put in place and adopted by the State Board of Education in 1984. All districts were required to be in compliance by July 1, 1987. The standards are periodically revised and most recently were revised in January, 2000.

87. If a school district is found to be not in compliance with one or more of the standards of accreditation, the district can suffer various consequences. Those range from a citation, which is a minor violation, to probation, which if not corrected could lead to a loss of accreditation. If a school loses accreditation after going through probationary status for two consecutive years, then it would be subject to a number of penalties including annexation, consolidation and other remedies.

88. Act 915 of 1995 requires the Department of Education to establish rules and regulations for which schools could be identified in academic distress in phases one, two or three. Phase one academic distress would be a school district that has 50% or more of their students in the lower quartile in the SAT-9 tests for grades 5, 7 and 10 for the last three years. If 40- 49% are in the lower quartile, the review includes five secondary indicators which are attendance rate, completion rate, the enrollment in the core curriculum, the percentage of students taught by teachers not certified in that subject area and disparity by race and gender on the SAT-9. If a school district is below the state average on three or more of these indicators, then it could be placed into phase one academic distress.

89. A phase one academic distress district is required to submit a written improvement plan. At the end of the year, implementation of that plan is reviewed, along with

the test scores. If there has been no significant decrease in test scores and the district did implement its improvement plan, then the district remains in phase one. If there is not sufficient evidence that the plan has been implemented or if the scores decrease greatly, the district can be placed in phase two academic distress.

90. If a district is in phase two, the Department of Education writes the improvement plan and the district's test scores are reviewed again to make certain there is no decrease in test scores. If either the plan is not implemented or there is a continued decrease in test scores, the district could advance to phase three academic distress.

91. A phase three academic distress classified school district becomes subject to action of the State Board of Education which could include consolidation with another district, annexation, or State take-over. There have been schools that have lost accreditation for one year, but never has a school lost their accreditation for two consecutive years. No school district in the State has ever been classified as phase three academic distress. Thirty-nine school districts have been identified in academic distress over the years. Currently there are twelve.

92. The Altheimer, Crawfordsville, Elaine and Parkin school districts have been in phase two academic distress for two consecutive years. Because all four implemented the plan drafted by the State Department of Education and there was no significant decrease in test scores, the criteria was not met to advance the districts to phase three academic distress.

All the districts on the academic distress list are in the group of schools classified as poor.

93. An academic improvement plan is required for all students who fail to perform at the proficient level as measured by the Benchmark exams. An academic improvement plan is developed for an individual student and indicates to the teacher and the student what that student's strengths and weaknesses and needs are in order to improve to be at grade level. The same state law which mandates the administration of the Criterion Reference Tests also requires

that any student who performs below that proficient level must have an individual plan written for how the school will address the deficiencies that that student has.

94. ACTAAP has a unique feature known as a school performance report, or school report card. This will measure individual schools and will be reported publicly. It shows how that school performed on a number of indicators that are found within ACTAAP.

95. Report cards issued by district and by schools are part of the overall policy adopted to insure a general, suitable, and efficient system of education. There is a three year history on some indicators. Generally, the report card will include the SAT-9 Norm Reference test scores, the Benchmark exams, a promotion rate, a school safety indicator, a percentage of teachers that are fully certified, a percentage with master's degrees, district date from one year on the millage rate, and average teacher salaries.

96. The test scores shown on the school report cards are the closest things to measuring what students know. It is permissible under the present system for a school district under a deficiency removal plan to have teachers teaching specific courses for which they are not certified

97. One of the components utilized to determine whether children are receiving an adequate education is to review the results of the accountability test. If only 44% of the general fourth grade population were proficient in reading and in the second year only 47% were proficient in English, that would indicate that the system had not provided those students enough resources to meet the goals.

98. For the eighth grade Benchmark tests administered in April, 2000, only 16% of the students were proficient or above in mathematics statewide and only nine percent were proficient or above in the Little Rock Schools.

99. Although the Rogers Public Schools score above the norm both state and nationally on the standard tests, there are students who score in the lowest 25% of the tests. Those are students who do not have the necessary skills to be successful academically in the rest of their careers.

100. The first test results reported for the fourth grade revealed that 35% of the fourth grade students in Rogers performed below the proficient level on literacy and 45% scored below the proficient level on mathematics.

101. By looking at the State's averages and the local assessments done by the Little Rock Schools, the gap between proficiency and deficiency has increased each year as students who are not proficient in the fourth grade have progressed through the system. Based upon the review of the most recent Arkansas academic achievement results, it can be said that this State has a remarkably serious problem with student performance. At these levels, students will not be able to compete successfully with their peers from other states let alone other nations. They will not be able to lead productive lives.

6. Rededication

102. The Rededication Rate identifies the percentage of students who as entering freshmen in college are required to take at least one rededication course in order to begin. The most recent statistics available indicate that the rededication rate for high school students entering college was 58% in either English or mathematics.

103. The school report card rededication rate reflects strictly seniors that graduated from high school. It does not include those who have come back to college after having been out of school for several years. Further, it measures only those students who go on to colleges. It is a logical conclusion that those who graduate but do not go on to college may have an even greater deficiency in either math or English.

104. Rogers Public Schools adopted an Academic Guarantee Policy in which the students were promised that if they had a three point zero or above grade point average and had taken certain steps in high school, which included college preparatory courses, and still had to be remediated in college, Rogers Public Schools would pay the tuition for the remedial courses. Of those students going on to college from Rogers High School in 1999, 44% had to take remedial classes in either English or mathematics. From the 1999 graduation class there

were 24 students with a 3.0 or better accumulative grade point average who took core courses and yet had to be remediated.

105. Entering students or students already in school may also be in need of rededication in order to perform at grade level. The Smart Start law states: "rededication means the process of using diagnostic instruments to provide corrective, specialized, supplemental instruction to help a student in grade two through four to overcome academic deficiencies". A.C.A. §6-15-419(10)(A)(i). It further provides, "rededication shall not interfere with or inhibit student mastery of current grade level academic learning expectations". A.C.A.§6-15-419(10)(B). The rededication rate of children in school directly relates to the child's not being prepared upon entering the first grade.

106. Students who need rededication are less likely to graduate from high school, go to college, become part of a skilled work force and are more likely to become engaged in criminal activity, enter the criminal justice system, and go to jail and prison where the State's annual cost to maintain the individual far exceeds the cost to remediate the student and make him an economic and cultural asset to the State. There is no evidence of any one system that will ensure that every child will leave the school system a productive member of society, but the evidence is overwhelming that students who start behind not only stay behind but that the gap between students who thrive and those who struggle continues to widen with age.

107. Teachers are given no extra time to plan or extra pay for students who are behind when they reach their classrooms. In many cases, those students continue to lose ground. The State does not provide any additional money or aides in order to help remediate those who need it.

108. One-on-one instruction is an accepted means of remediating students. However, Rogers Public Schools cannot provide that type of rededication due to a lack of funds. A school district with a higher percentage of students who are not proficient will not be able to remediate if it cannot be done in Rogers.

109. A student who is not proficient in one of the

ACTAAP testing areas must be remediated. There is no additional help from the State to assist a specific or individual child in need of rededication.

110. The Department of Education offers assistance to school districts as a part of the Smart Start and Smart Step (which is a continuation of Smart Step for grades following grade four) initiatives. The assistance comes in the form of additional training for teachers. However, there is no additional money provided to the district to send the teachers to that training.

111. The change in mandatory attendance laws which occurred in 1987 has had a significant impact on the schools. The fact that students are not allowed to drop out from schools (which is a desirable end) has, nevertheless, resulted in an increased expense because more rededication is required for the students who at one time would have left the system. [Standridge] That has required the creation of alternative schools for secondary students who just cannot adapt to the traditional high school. Each school district is required to have an alternative school.

112. The Rogers Public Schools do not have enough funds to do everything necessary to remediate the children not performing at grade level. The district needs extra tutorial programs. There needs to be transportation for a large majority of the students to attend these programs. It needs smaller class sizes for those students who are below grade level. And it needs to have more learning aides for those students. The district also needs money to help the parents learn how to work with their children.

7. Teacher Salaries

113. Arkansas' entry level teachers' salaries are dead last among all of its eight bordering states. This underscores the State's labor market disadvantage in the competition for teaching talent. The State's average beginning salary is 82% of the national average and is also below that of its regional competitors. The State spends 20% less on average for its teachers than the national average and 20% less for its beginning teachers. The cost of living is less in Arkansas, but it is unlikely to be anywhere close to 20% less.

114. In the Memphis, Tennessee city school district, average teachers' salaries are $40,190. Beginning teachers' salaries with a BA for the 2000-2001 school year are $32,045. In areas surrounding Memphis in Shelby County, Tennessee, the beginning salary is $31,895. In contrast, the corresponding Arkansas school district has average salaries of $34,209 and starting salaries for teachers with a BA of $26,350. Beginning Arkansas teachers competing with Memphis would need immediate raises of $5,625 each and the average Arkansas teacher salary would have to be immediately raised by $5,981 just to catch up. There is no evidence in the record to indicate whether the Memphis school district intends to give raises in the future but it can be reasonably assumed that it will.

115. In Texarkana, the average salary for beginning teachers with a BA degree is $20,437. The average salary is $32,537. In contrast the adjoining school district in Texas pays beginning teachers $24,240. Arkansas is paying beginning teachers $3803 less than Texas. When compared to similar occupations, Arkansas teachers receive approximately 91% of what non-teachers receive.

116. Rogers ranks second in the State in teachers' salaries. Springdale Public schools rank first, Bentonville Public Schools ranks 66th and Fayetteville Public Schools ranked 20th in average teachers' salaries. The teachers' pay schedule has substantially affected the ability of the Rogers Public Schools to recruit and retain teachers. Rogers recruits teachers outside of the Northwest Arkansas area, including other states such as New Mexico and Texas.

117. Even though Rogers is the seventh highest paying district in the State in starting salaries, the minimum salary in nearby Oklahoma for their lowest paying district is higher than the Rogers salaries. The stricter licensing requirements and the increased expectation of teachers have not been accompanied by a concomitant increase in pay. There are as many as 12,000 certified teachers in Arkansas at present who are not teaching.

118. The Lake View high school science teacher has 41 years teaching experience and two Masters Degrees and makes $31,500 per year, as compared to the Barton kindergarten teacher with a bachelor's degree with 21 years

experience making $33,610 per year. [Davidson, V. Phillips] A teacher with two Masters Degrees and 38 years experience in the Ft. Smith school district would make $43,524 per year. [Gooden]

119. While some disparity is acceptable in teachers' salaries, differences that exist are so great that they work to destabilize the education system by driving qualified teachers away from districts where they are most needed. Schools and school districts with more disadvantaged students need more qualified teachers per student. However, the schools with the higher number of disadvantaged students are typically the schools which have the lower teacher salaries.

120. Arkansas' teacher salaries rank 45th in the nation. Poorer school districts which are bordered by other states and school districts which pay higher salaries have a difficult time recruiting new teachers. The State Board of Education is in the process now of trying to advance a comprehensive strategy to attract, motivate and retain high caliber teachers to the teaching profession. That strategy demands increases in salaries.

121. The working conditions in the schools such as lack of supplies and inadequate facilities also make recruiting and retaining teachers very difficult. There are problems recruiting teachers to the Lee County Schools and the Holly Grove School District because of low pay. Many of those that do teach in Lee County have to have a second job in order to live.

122. Arkansas teachers are underpaid in comparison to the rest of the market. Bentonville has difficulty filling positions in the vocational areas in particular because the pay is much better in the private sector. Bentonville will lose 15% of its teaching corps in the next three years due to retirement. It has a difficult time recruiting and maintaining teachers in the computer arts field due to the inability to compete with salaries in the industry.

123. Teachers' salaries are the most critical thing Arkansas needs to address. ACTAAP, Smart Start, and Smart Step all depend primarily on the classroom teacher to function. The challenges of finding ways of retaining quality teachers

and attracting new teachers is going to take additional funding. The single most important factor necessary to insure that the State's system of education meets the *Rose* factors is the availability of well educated, well motivated, and well compensated teachers.

IV. STATEMENT OF LAW

124. As previously found by this court, the Arkansas Constitution, Article 14, §1 requires that the State provide a "general, suitable and efficient system of free public schools' and Article 2, §§ 2, 3, and 18 requires that the schools be equally available to all the people. Article 14, §1 also permits the State and the school districts to "spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age. . ."

125. Amendment 40 provides that "The General Assembly *shall* provide for the support of the common schools. . ." and provides that "school districts are hereby authorized to levy . . . an annual tax for the maintenance of schools. . ." (Emphasis added) Amendment 74 to the Constitution allows for variances in funding to local school districts. "The primary reason for allowing such variations is to allow school districts . . . to raise additional funds to enhance the educational system within the school district." It is the responsibility of the State of Arkansas to provide for the support of public schools and to ensure that those schools provide an adequate, or general, suitable and efficient educational system. The Constitution has no provision to allow the ultimate responsibility to be shifted to local school districts or to except individual students from the benefit of an education.

126. Conclusion of Law No. 9 of the 1994 Order states as follows:

> While Arkansas has not defined the terms "general, suitable, and efficient", courts in other states have defined these terms. In *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 191-192 (Ky. 1989) the Court defined "efficient" as a system which required "substantial uniformity, substantial equality of

financial resources and substantial equal educational opportunity for all students" and which required that the educational system be "adequate, uniform and unitary." *Id.* at 192. The Court concluded that "an 'efficient' system of common schools should have several elements:

1. The system is the sole responsibility of the General Assembly.

2. The tax effort should be evenly spread.

3. The system must provide the necessary resources throughout the state - they must be uniform.

4. The system must provide an adequate education.

5. The system must be properly managed." *Id* at 211.

The Court went on to say that "an efficient system of education must have as its goal to provide Every child with at least the seven following capacities:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

(ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

(iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

(iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
>
> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market. *Id.* at 212. See also *Pauley v. Kelly*, 255 S.W.2d 859 (W.V. 1979).

127. Conclusion of Law No. 16 of the 1994 Order states as follows:

> The Arkansas school funding system violates Article 14, Section 1 of the Arkansas Constitution by failing to provide a "general, suitable and efficient system of free public schools." See *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340 (1983).

128. Amendment 74 (b)(2) States in part as follows: "Except as provided in this subsection the uniform rate of tax shall not be an additional levy for maintenance and operation of the schools but shall replace a portion of the existing rate of tax levied by each school district available for maintenance and operation of schools in the school district. . .

129. In *Dupree v. Alma School District No. 30*, 279 Ark. 340; 651 S.W.2d 90 (Ark. 1983), the Supreme Court stated,

> . . . the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence . . . Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged. . . The evidence offered may have shown that the appellee districts offered doubt that they were proved to be suitable and efficient. However, even were the complaining districts shown to meet the bare requirements of educational offerings, that is not what the constitution demands. For some districts to

> supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. *Bare and minimal sufficiency does not translate into equal education al opportunity.* (Emphasis added) "Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action." *San Antonio School District v. Rodriguez*, 411 U.S.1, 70, 93 S.Ct. 1278, 1315, 36 L.Ed.2d 16 (1972). *"Whether the state acts directly or imposes the role upon the local government, the end product must be what the constitution commands. [When a district falls short of the constitutional requirements] whatever the reason for the violation, the obligation is the state's to rectify it. If local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation."* (Emphasis added) *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, 295.

130. A.C.A. §26-80-204(17) is the statute setting forth the calculation of the uniform rate of tax:

> "Uniform rate of tax" means a uniform rate of ad valorem property tax of twenty-five (25) mills to be levied on the assessed value of all taxable real, personal, and utility property in the state to be used solely for maintenance and operation of the schools. In calculating the uniform rate of tax imposed by Arkansas Constitution, Article 14, § 3, as amended by Arkansas Constitution, Amendments 11, 40, and 74, the following categories of millage may be utilized to meet the minimum base millage requirement:
>
> (A) The local school district's maintenance and operation millage;
>
> (B) the dedicated maintenance and operation millage;

(C) Excess debt service millage; and

(D) The millage derived from the ratio of the debt service funding supplements divided by the total assessment; . . .

131. A.C.A.§26-80-204(4) gives the definition for "Base local revenue per student" as follows:

(A) As applied under Acts 1995, No. 917, as such may be amended from time to time, if Category 1 is fully funded, the local revenue per student in the local school district with the highest amount of local revenue per student.

(B) If Category 1 is not fully funded, the term means the revenue per student to which the state equalizes calculated by taking the sum of:

(i) The total available state aid for state equalization funding per student;
ii) Ninety-eight percent (98%) of the uniform rate
of tax times the total state assessed valuation; and
(iii) Seventy-five percent (75%) of the average miscellaneous funds collected in the previous five
(5) years or the previous year, whichever is less, and by dividing the sum by the total state average daily membership for the previous year. . .

132. A.C.A. §26-80-204(10) states the definition of "local revenue per student" as follows:

. . . as applied under Acts 1995, No. 917 as such may be amended from time to time, in each year ninety-eight percent (98%) of the amount of revenue available, whether or not collected, in a local school district solely from the levy of the uniform rate of tax plus seventy-five percent (75%) of the average miscellaneous funds collected in the previous five (5) years or

> the previous year, whichever is less, divided by the average daily membership of such local school district for the previous year. . .

133. A.C.A. §§6-15-401 et seq. contain the provisions for the Arkansas Comprehensive Testing, Assessment, and Accountability Program Act (ACTAAP). A.C.A. §6-15-402 (a)(1) states as follows:

> The purpose of the Arkansas Comprehensive Testing, Assessment, and Accountability Program
> Act is to provide the statutory framework necessary to ensure that all students in the public schools of this state demonstrate grade-level academic proficiency through the application of knowledge and skills in the core academic subjects consistent with state curriculum frameworks, performance standards, and assessments. The State of Arkansas recognizes and declares that students who are not performing at grade-level standards of academic proficiency are especially harmed by social promotion because they are not equipped with the necessary academic skills to be successful and productive members of society. The Department of Education is committed to having all students perform at grade level and beyond. For this reason, the Arkansas Comprehensive Testing, Assessment, and Accountability Program will emphasize point-in-time intervention and remediation upon the discovery that any student is not performing at grade level.

134. A.C.A. §6-15-419(10) states as follows:

> (A) (i) "Remediation" means a process of using diagnostic instruments to provide corrective, specialized, supplemental instruction to help a student in grades two through four (2-4) overcome academic deficiencies.
>
> (ii) For students in grades five through

twelve (5-12) remediation shall be a detailed, sequential set of instructional strategies implemented to remedy any academic deficiencies indicated by below-basic or basic performance on the state-mandated criterion-referenced assessments.

(B) Remediation shall not interfere with or inhibit student mastery of current grade level academic learning expectations.

V. CONCLUSIONS OF LAW

A. Equity

1. The Fort Smith School District curriculum offers a variety of courses, including fashion merchandising and marketing, and has access to courses at a local technical college. By comparison, Holly Grove, Lake View and Lee County are examples of school districts that provide the bare necessities of a curriculum and struggle to do so. Perhaps the deprived schools and school districts may never be able to offer the rich curriculum of Ft. Smith and others in similar circumstances, but the stark contrast between Ft. Smith and Holly Grove, Lake View and Lee County is a clear example of students being deprived of their rights of equal protection provided by Arkansas Constitution, Article 2, §§ 2, 3 and 18 by reason of their "fortuitous circumstance of residence" as stated in *Dupree*. Under Arkansas Constitution Article 14, §1 and Article 2, §§2, 3 and 18, school districts throughout the State must provide substantially equal educational opportunities for their children. Denying these opportunities based solely on a school district's location in a poorer part of the State is not a compelling reason for the State to abandon its constitutional obligations.

2. Buildings properly equipped and suitable for instruction are critical for education and must be provided. Even though supplemental money is provided to districts that incur debt for capital improvements, districts that cannot afford to incur debt receive no funding from the State for such improvements. The State cannot shift to local school districts its ultimate burden of ensuring every school district has substantially equal facilities to provide a general, suitable and

efficient system of education. When the local district fails or has failed because of the inequitable effects of the funding formula, or for some other reason, to build or maintain adequate facilities, or mismanages its resources for its daiiy operations, the State cannot abdicate its Constitutional responsibility and blame "local control." The State's constitutional role is to ensure an adequate and equitable education and consequently it must correct any constitutional deficiencies as soon as possible. To allow certain districts to continue to suffer from the results of past inequities such as lack of adequate facilities, equipment and supplies, making it harder for them to attract qualified staff, teachers and students, is itself inequitable.

Improving the quality of schools has a high priority across the United States, and, perhaps, the world. School districts within the State are in competition with one another and the State competes with its neighbors. The school districts that are most fortunately endowed with resources continue to have inherent advantages, namely property wealth, that allow them to improve. Many of the schools on the bottom lack these inherent advantages as they struggle to achieve equality. Under the present funding system, by the time the poorer districts reach the level of the more prosperous districts, *if* they can, they will still find themselves at or near the bottom. Providing equal funding to all school districts will not cure the inequities.

For the reasons stated, the equal protection and opportunities guaranteed by Article 2, §§ 2, 3 and 18 have not been provided in that every school district does not have an equal opportunity to build, renovate and/or maintain the necessary physical plant. To provide an equal opportunity, the State should forthwith form some adequate remedy that allows every school district to be on equal footing in regard to facilities, equipment, supplies, etc. Under Arkansas Constitution Article 14, §1 and Article 2, §§ 2, 3 and 18, school districts throughout the State must provide substantially equal buildings properly equipped and suitable for instruction of students. Denying these facilities based solely on the district's location in a poorer part of the State is not a compelling reason for the State to abandon its constitutional obligations.

3. a) There are three reasons that expenditures

and not revenues should be used in calculating the Federal Range Ratio: 1) The Supreme Court used the term "expenditures" in expressing concern that "disparities in per pupil expenditures" be corrected; 2) An accurate accounting of expenditures is the best measure of whether available funds are being efficiently applied to education; and 3) The 1994 Order specifies that expenditures and not revenues be used in the calculation. Number 3 can be discounted because of the 1996 order that found the law of the case doctrine would not be applicable at a later trial; however, the other two reasons are sufficient to require expenditures as the component of the Federal Range Ratio. No doubt to the extent reliance is placed upon the formula, this puts a heavier administrative burden on the State, but the responsibility of equitably funding the educational system is solely the State's, and therefore the State must take necessary steps to effect a more accurate accounting of expenditures.

b) The desegregation money provided to the Pulaski County School Districts should not be included in calculating the Federal Range Ratio because they represent funds that compensate the Pulaski County School Districts for expenses unique to them. *See also Magnolia School District No. 14 of Columbia county, et al. v. Arkansas State Board of Education, et al.*, 303 Ark. 666, 799 S.W.2d 791 (1990).

c) The Plaintiffs were unable to overcome the presumption of constitutionality in the State's use of categorical funding rather than Weighted Average Daily Membership in the school funding formula. By passing new legislation, the State has attempted to make improvements in the school funding formula provisions for special or high cost students. The improvements may not be ideal, but the Plaintiffs have failed to prove them unconstitutional. Therefore, it is not necessary to use Weighted Average Daily Membership in calculating the Federal Range Ratio.

4. The teachers' salary disparity within the State is a violation of Article 2, §§ 2, 3 and 18, because the disparity is the result of local school district discretion and bears no rational relation to the State's interest in providing a general, suitable and efficient education for our children. Moreover, the salary disparities act to destabilize local districts that cannot or will not pay competitive salaries and are unable to

hire and retain quality teachers.

5. The Plaintiffs have raised the issue that Amendment 74 and Article 2, §§ 2, 3 and 18 have been violated by allowing under A.C.A. §26-80-201 et seq. school districts to use the excess debt millages to satisfy the uniform tax rate of 25 mills. However, the court finds otherwise. Plaintiffs' argument is that Amendment 74 requires school districts to levy twenty-five mills to be dedicated to maintenance and operations, and that by failing to do so the State loses substantial sums of money that would otherwise be available for Arkansas public schools. Some school districts have levied various millages in order to secure debt incurred through bond issues. Because of the requirement that millages dedicated to the retirement of debt be equal to 150% of the indebtedness there are virtually always excess debt millages. In fact, it is represented in the bond indenture, and, therefore, the voters must be presumed to know that the excess millages are to be available for maintenance and operations.

Plaintiffs complain that this use of excess debt service mills does not satisfy Amendment 74 and that the amendment requires each school district to levy twenty-five mills, independent of any other mills, exclusively for maintenance and operations. However, Amendment 74 (b)(2) states in part, "Except as provided in this subsection the uniform rate of tax shall not be an additional levy for maintenance and operation of the schools but shall replace a portion of the existing rate of tax levied by each school district available for maintenance and operation of schools. . ."

The Plaintiffs argue for a result that could easily have been obtained by more specific language in the amendment. However, no such language is present, and therefore, the method of counting mills to meet the uniform rate of tax used by the State complies with the language of the Constitution.

2. Adequacy

6. A comparison of Arkansas teacher salaries to Memphis, Tennessee and Texarkana, Texas (competitive markets) illustrates a dire situation. Money may not be the only motivator to attract quality personnel, but it appears to be

the most consistent one. This is even more of a factor for teachers in specialized fields (e.g., teachers of English for students for which English is a second language and teachers in newly evolving technologies). Teachers' salaries in this State are wholly inadequate under the *Rose* standards to attract and maintain qualified teachers to provide our students with the education Article 14, § 1 of our Constitution requires and as articulated in detail in *Rose* and the 1994 Order. The requirements of ACTAAP cannot be met without high quality personnel, but there is no money available to hire them. No deficiency in our education system is in more urgent need of attention than teachers' salaries.

7. Three facts were uncontroverted at trial: 1) A substantial number of our children are entering kindergarten and first grade significantly behind their peers; 2) Those children that enter the first grades needing remediation will have a difficult time performing at grade level by the third grade; and 3) If a student cannot perform at grade level, especially in reading, by the third grade, then he is unlikely to ever do so. The only possible conclusion is that in order to provide our children with an adequate education as required by the Constitution and ACTAAP, the State must forthwith provide programs for those children of pre-school age that will allow them to compete academically with their peers. The urgency of this need equals that of the deficiency in teacher salaries.

8. An uneducated person has virtually no chance today to sample much more than a harsh subsistence. *Dupree* was decided eighteen years ago when the Supreme Court found the State's funding system to be unconstitutional and that many of Arkansas' students were receiving only the bare rudiments of an education. Not much has changed since then except that nineteen classes have graduated from our high schools; practically a generation.

This case was begun in 1992. Since then, nine classes have graduated from our high schools. One wants to believe that at least our better students are being well educated. However, the Rogers School District program to pay for college remediation for its top students reveals the sad reality of the quality of our education system today. If our best are not being prepared for the rigors and trials of an ever

increasingly complex world, what is happening to the least advantaged to whom we owe an equal or greater duty?

If an adequate education system exists for all of Arkansas' students, then it follows that the system will be equitable. The State funds its educational system by first determining how much money is available and then deciding how to divide it. The State refers only to available funds and not to Constitutional requirements. Perhaps an adequate amount of education funding can be determined in this manner, but that seems impossible to this court. Pursuant to Act 917 of 1995, and in order that an amount of funding for an education system based on need and not on the amount available but on the amount necessary to provide an adequate educational system, the court concludes an adequacy study is necessary and must be conducted forthwith.

C. Contempt

9. Plaintiffs' request that the State Defendants be held in contempt of court for failure to comply with the terms of the 1994 Order. This the court declines to do. While it is true that some of the constitutional deficiencies found in the 1994 Order still exist, the State has attempted through legislation, particularly Act 917 of 1995, and Amendment 74 to ensure a more equitable funding of the schools. For the reasons stated above, these efforts fail to correct all of the constitutional shortcomings found in 1994, but there is insufficient evidence to indicate that the failure was wilful or contemptuous.

VI. REMEDY

The court recognizes the exceptional intractability and complexity of the problem at hand. There is a shortage of resources. Taxation, political and cultural hurdles to a solution may seem to create a Gordian knot; a problem not to be solved. It seems impossible to read a newspaper, news magazine or listen to a news broadcast without encountering opinions of all varieties addressing education; how to do it, how to fund it. Countless books have been written on the same subjects. However, it can be safely said that the one constant is the agreement that an adequate education for our children is necessary. Our Constitution requires it. Too many

of our children are leaving school for a life of deprivation, burdening our culture with the corrosive effects of citizens who lack the education to contribute not only to their community's welfare but who will be unable to live their own lives except, in many cases, on the outermost fringes of human existence. No problem we face as a State needs more immediate attention.

We should resort to the courts in forming a remedy for the many problems noted here only when all else has failed. They are not equipped to undertake the task. And, speaking for this court, it would only be with utter and profound reluctance that it would attempt such an endeavor. However, it is difficult to overstate the urgency and magnitude of these issues which are, for now, left to the legislature.

If any of the findings of fact are deemed to be conclusions of law or any conclusions of law are deemed to be findings of fact, then they are hereby adopted as such.

All issues raised in the various pleadings listed on pages 6-7 have now been addressed except for the request for attorneys' fees addressed in the next section. If the other requests were not addressed directly by this order, the relief requested is denied.

VII. Attorneys' Fees

The Supreme Court, in its March 2, 2000, Order in *Lake View*, held that this court erred in denying attorneys' fees to the Plaintiffs. The fee request was based on the benefit derived by the State and all members of the Class from new legislation passed since the 1994 Order. The Supreme Court stated this case is analogous to *Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986), wherein the Supreme Court decided that Millsap's derivative suit on behalf of Millsap Processed Foods (MPF) preserved a value of over $540,000 in corporate assets. The Court increased the attorneys' fees based on the economic benefit to MPF resulting from counsel's efforts.

"Here, there is no question but that a substantial economic benefit has accrued not only to the poorer school districts as a direct result of Lake View's efforts but to the state

as a whole." *Lake View* at 495. The Court held that even though sovereign immunity applied as a defense for the State Defendants, that the State waived that defense by agreeing to notices to the Class advocating attorneys' fees be paid. The Court did decline to mandate a particular method for calculating fees or to state a particular fee amount.

Arkansas generally follows the American rule, which is that attorney fees are not chargeable as costs in litigation unless specifically permitted by statute. *Millsap*, 706 S.W.2d at 379. An exception to the American rule is the common fund theory of awarding fees. The common fund theory allows that where a plaintiff has created or augmented a common fund for the benefit of others as well as himself, attorney fees may be awarded. *Id.* In common fund cases such as this, courts allow the lawyers to recover fees if there has been a substantial benefit to members of a class. In *Lake View*, the Supreme Court states the common fund of $130,000,000 benefits the Plaintiffs and the whole State of Arkansas.

The rationale for allowing fees to the lawyers is one of fairness in that those not directly involved in the litigation, namely the members of the Class and the State, have benefitted from the efforts of the lawyers while incurring no risk themselves. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). Or put another way, persons who obtain a benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense. *Boeing v. Van Germert*, 44 U.S. 472 (1980). It is based on the equitable theory that those who have benefitted from litigation should share its costs. *See* Report of the Third Circuit Task Force, *Court Awarded Attorneys Fees*, 108 FRD 237 (Arthur R. Miller, Reporter 1985).

In this case, the attorneys agreed that a common fund of $130,000,000 for school districts was created through new legislation by the Plaintiffs' lawyers efforts. As stated in the *Lake View* opinion, "... at the April 6, 1998 hearing, James M. Llewellyn, Jr., on behalf of the State advised the chancery court that 'at least One Hundred Million and probably more' was created by the effects of Amendment 74 alone and that 'all of us still stand on the Agreed Order recitation that there was [a] One hundred and Thirty Million Dollar fund created.'" *Lake*

View at 495.

Further, the substantial or common benefit theory of recovery would apply here too. Under that theory, the common fund doctrine would be applied to cases where lawsuits produce nonmonetary benefits. *See generally Mills v. Electric Auto-lite*, 396 U.S. 375 (1970); *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Courts have treated both the common fund and the common benefit doctrines as one, but the trend is to treat them independently. The issue under both doctrines is whether a substantial benefit, pecuniary or otherwise, was conferred on an ascertainable class. *Mills, supra.*

The Supreme Court stated in *Lake View* that "With the gradual elimination of disparities in funding and opportunities for students and with the passage of Amendment 74, education in the State unquestionably has benefitted." *Lake View* at 495.

Once the court determines that a common fund or benefit has been created, the next step is to determine a reasonable attorneys' fee. The issue becomes whether the court should award a fee based on a percentage of the common fund created or by some other approach. One purpose of the percentage method is to encourage early settlement by not penalizing efficient counsel and ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation. *See* 3 Herbert B. Newberg & Alba Conte, Newberg on Class Action, §14.03 at 14-3 through 14-7 and cases in footnotes 17-20 (3d ed. 1992). The importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk non-payment has been recognized. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980).

Along with the contingent fee based on the economic benefit, the lodestar approach of awarding attorney fees was mentioned by the Supreme Court as a possible theory under which this court may award fees. In the 1970s, federal courts awarded a reasonable percentage of a created fund as a reasonable fee award. *See* Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 FRD 237, 242 (Arthur R. Miller, Reporter 1985). As class action litigation

increased, high fee awards were criticized and courts tried to find a common fund fee determination that would yield a reasonable fee supported by specific findings. *See* Conte, Attorney Fee Awards,§2.03, 2nd Edition. The Third Circuit in *Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp* (*Lindy I* and *Lindy II*), *supra*; 540 F2d 102 (3d Cir. 1976) (en banc), held that the trial court must articulate its findings to demonstrate the reasonableness of the amount of fees awarded. 487 F2d at 166-167. The lodestar method was given as a guideline by the Third Circuit and it allows that a court must first multiply the hours reasonably spent by a normal hourly rate for noncontingent work to arrive at a lodestar figure. The lodestar should then be further considered for adjustments for factors such as contingency and quality. *Id.* at 167-170.

The Fifth Circuit later set forth twelve factors to consider in determining a reasonable fee award. Those factors are 1) The time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and the length of the professional relationship with the client; and 12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

"In practice, the lodestar method proved difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. Accordingly, it has been criticized by courts, commentators, and members of the bar." Manual for Complex Litigation, Third, §24.121 *citing* "Court Awarded Attorneys Fees, Report of the Third Circuit Task Force," *reprinted in* 108 F.R.D. 237 (1985). "In recent years, the trend has been toward the percentage of the fund method." *Id.* One reason for preferring the percentage over the lodestar method is that when courts consider the time spent on cases in awarding fees, a plaintiff's lawyer has no incentive to settle a case when the court is using lodestar. *Johnson, supra.* Further, a fee based on the value of

time expended is no more logical than basing it on out of pocket expenses. The rationale is that either can be manipulated and deter settlement.

Today, courts have largely reconciled the two methods (percentage and lodestar) in common fund cases because in actual practice the proper use of both methods should lead to a common fund fee of similar size. *See* Conte, §2.06 and *Wing v. Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997).

The Arkansas Supreme Court has established factors in determining fee awards much like those set forth in *Johnson*. See *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717(1990). Those factors include the experience and ability of the attorney, the time and labor required to perform the legal service properly, the amount of money involved in the case and the results obtained, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, whether the fee is fixed or contingent, and the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. *Id.*at 229.

In applying the above factors to this case, the court finds that the time and labor involved in this litigation has been long and arduous. The fact that the case was filed in 1992, the obvious substantial preparation and study necessary to prepare before filing, the 26 volumes of pleadings and the sheer magnitude of discovery, indicates the time spent. The Plaintiffs' lawyers state that in excess of 15,000 hours have been spent on this case over the last ten years. No one has disputed that.

The novelty and difficulty of the questions involved are quite obvious to this court. The issues presented span the education system, which is an enormous subject to grasp. Many witnesses testified not only about the nearly impenetrable complexity of education funding and the complicated contemporary education system, but also touched on the relationship among the statewide property tax that creates the school fund, various statutes related thereto, and Amendment 59. The many details not covered by this opinion could fill hundreds of pages.

The customary fee for such a case is a contingency fee basis. Expert witnesses Richard Hatfield testified that contingency fees are normally 33 1/3% and even 40% in extremely difficult cases. (Deposition of Richard Hatfield, p. 24) The average percentage fee award in Arkansas is 25%. (Deposition of Carrold Ray, p. 47) The fee arrangement was contingent on recovery, and the contingency puts the Plaintiffs' lawyers at a very high risk because of the time and effort involved and the uncertainty of success and the collecting of a fee. After years of work and providing an invaluable service to the State, because of the appellate process, Plaintiffs' lawyers do not know to this day when or how much they will be paid.

The attorneys for the Plaintiff class have the experience necessary and have built a reputation in the litigation of this case. Because of their relationship with the named Plaintiff and their interest in this litigation over a ten year period, the lawyers persevered and have prevailed at the trial and appellate levels. As a result of the lawyers efforts, new legislation was passed in 1995 and 1997, along with Amendment 74 in 1996, and a common fund of $130,000,000 was created that benefitted the entire Class.

Plaintiffs point to numerous cases in Arkansas wherein attorney fees have been awarded based on a percentage of the common fund created in class action cases. See *Cash v. City of Little Rock*, 277 Ark. 494, 644 S.W.2d 229(Ark.1982) where 25% of benefit was awarded as fee; *Ragan v. Venhaus*, 289 ark. 266, 711 S.W.2d 467 (Ark. 1986) where 10% of benefit was awarded as fee; *Henry v. Powell*, 262 Ark. 763, 592 S.W.2d 107 (Ark. 1980) where 15% of benefit was awarded as fee; *Graham v. City of North Little Rock*, 278 Ark. 547, 647 S.W.2d 452(Ark. 1982) where 25% of benefit was awarded as fee; *Bosnick v. Pledger*, 306 Ark. 45, 811 S.W.2d 286 (Ark. 1989) where 15% of benefit was awarded as fee; *Hasha v. City of Fayetteville*, 311 Ark 460, 845 S.W.2d 500(1993) where 25% of benefit was awarded as fee; *Hartwick v. Thorne*, 300 Ark 502, 780 S.W.2d 531 (1989) where 15% of benefit was awarded as fee; and *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995) where 58% of amount recovered was awarded as fee. The percentages have been reduced in cases where the recovery or fund has been exceptionally large.

Plaintiffs argue and the court agrees that the factors to be considered in determining the award of fees have been met. As stated above, the Plaintiffs worked on a contingency fee basis, and therefore, no contemporaneous time records were kept during the years of litigation prior to June 19, 2000. Plaintiffs seek a percentage fee award of 25% of the common fund of $130,000,000, or $32.5 million, plus costs in the amount of $325,000.

Therefore, taking into consideration the circumstances of the case, the expert testimony given by Carrold Ray and Richard Hatfield regarding attorney fees in this case, the affidavits filed by the Plaintiffs' lawyers, the responsive brief filed by the State Defendants, the contingency nature of the case, and the factors as set out under *Johnson* and *Chrisco*, and for, as recognized by the Supreme Court, the Plaintiffs' efforts in creating a substantial benefit for the State as well as the common fund of $130,000,000.00, Plaintiffs' lawyers are awarded $8,500,000.00 for the liability phase of this lawsuit. This amount is approximately 6.5% of the $130,000,000.00 common fund which is quite low compared to other percentage fee cases, but the court finds this percentage reasonable considering the unprecedented amount of the common fund.

As an aside, if the court were to apply the lodestar theory, it would first have to decide the number of hours the lawyers worked. Using the undisputed 15,000 hours claimed by the Plaintiffs' lawyers for the liability phase (i.e. through the 1994 Order) and applying an hourly rate of $150.00, the same award would be obtained using a multiplier of 3.778 (because of the length and difficulty, the risk of being paid being contingent upon success and the importance of this case, a multiplier of 3 to 4 is reasonable).

The Order of July 27, 2000, states in pertinent part as follows:

> "The Court will accept no further evidence or testimony on the issue of attorneys' fees for class counsel. The Court declines to rule, at this time, concerning the method by which the Court will calculate a fee award to class counsel. However, all counsel for the Lake View School district and the plaintiff class are

> hereby ordered to prepare and submit to the Court: . . .(b) for the period from February 1998 through June 18, 2000, "reconstructions" of time records or estimates of time spent and work performed on this case."

Even though the court intended for the lawyers to reconstruct their time records and feels that intention was made very clear in open court, a reasonable interpretation of the above order could be an estimate of hours. The Plaintiffs' lawyers did submit a joint affidavit summarizing their work generally and stating that their combined efforts were anywhere from 4,500 to 5,500 hours from February, 1998 to June 18, 2000. No hourly fee request was given. Because only a bare estimate was provided, the court will allow 3,500 hours.

Finally, the Plaintiffs' lawyers submitted affidavits stating the hours worked on this case between June 19, 2000, and November 1, 2000. Combined, the attorneys worked 2,086.90 hours during that time. However, no hourly rate was stated. The court will allow an hourly rate of $150.00 for work between February, 1998, and November 1, 2000.

Therefore, the court hereby awards attorneys' fees in the amount of $838,035.00 for the time period beginning February, 1998, through November 1, 2000. Thus, Plaintiffs' lawyers are awarded total attorneys' fees in the amount of $9,338,035.00. There will be no additional award for costs.

In any future request for fees, Plaintiffs must submit contemporaneous time records and state an hourly rate.

Plaintiffs' request for fees for the Plaintiffs' Solicitor is denied.

The Court denies the State Defendants' request to reapportion the fee for the Trial Transcript.

IT IS SO ORDERED.

/S/

Chancellor Collins Kilgore

Date May 25, 2001

LAKE VIEW SCHOOL DISTRICT NO. 25 of Phillips County, Arkansas, *et al.* v. Mike HUCKABEE, Governor of the State of Arkansas, *et al.*

99-28 **10 S.W.3d 892**

Supreme Court of Arkansas
Opinion delivered March 2, 2000

COUNSEL

Wilson & Valley, by: J.L. Wilson; Lewellen & Associates; Don Trimble; and Jack, Lyon & Jones, P.A., by special attorney Eugene G. Sayre, for appellants.

Mark Pryor, Atty. Gen., by: Tim Humphries, Senior Asst. Atty. Gen.; and Thompson and Llewellyn, P.A., by: William P. Thompson, for appellee.

Lavey & Burnett, by: John L. Burnett, for amicus curiae American Civil Liberties Union.

LEAD
ROBERT L. BROWN, Justice.

The original plaintiffs in this case, now appellants, are Lake View School District No. 25 of Phillips County, Arkansas and School District board members and officials, and certain individuals residing in Phillips County (hereafter Lake View). The defendants, now appellees, are the Governor of the State of Arkansas, the Treasurer of the State of Arkansas, the Speaker of the House of Representatives and President Pro Tempore of the Senate of the Arkansas General Assembly, officers of the Arkansas Department of Education, and members of the Arkansas Board of Education (hereinafter State of Arkansas). In this appeal, Lake View raises multiple substantive issues relating to the final order of the chancery court, which dismissed the Lake View complaint, and its petition to show cause for contempt on grounds of mootness and failure to state a claim under Ark. R. Civ. P. 12(b)(6). Lake View further appeals the chancery court's denial of attorneys' fees. We hold that two bases for the Lake View appeal have merit. The trial court erred in dismissing Lake View's

complaint and show-cause petition for mootness and for failure to state a claim. It also erred in denying attorneys' fees.

I. Procedural History

The history of this case is long and tortured, but reviewing the history is critical to the resolution of the matter. On August 19, 1992, Lake View filed suit against the State of Arkansas, in which it contested the constitutionality of the public school funding system under both the U.S. Constitution and the Arkansas Constitution. Lake View requested that the chancery court declare the school funding system unconstitutional and that the court enjoin implementation of the unconstitutional system. This complaint subsequently was amended five times. The second amended complaint was tried before the chancery court for five days in September 1994. Following trial, the chancery court entered its order on November 9, 1994. The order was fifty-two pages long, and it contained one hundred and forty-seven findings of fact and eighteen conclusions of law.

What was at issue in the Lake View case was the disparity in funds available for education in school districts across the state under the school funding system. In 1994, school districts received approximately thirty percent of their revenue from local funds, sixty percent from state aid, and ten percent from federal funds. Local funds were tied to the local tax base which was tied to property values within the districts. School districts with higher property values necessarily generated higher local taxes and more money available for education. This resulted in significant disparities. As an example, disparities in per pupil expenditures in the 1992/93 school year ranged from $4,064 spent per pupil in the Little Rock School District to $2,270 spent per pupil in the Mountain View School District. One of the purposes of state aid was to equalize per pupil expenditures regardless of the wealth of the school district and to make available equal educational opportunities for all students. *See Dupree v. Alma School District No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

In its November 9, 1994 order, the chancery court concluded that the equal protection provisions of the Arkansas Constitution (Article 2, §§ 2, 3, 18) applied to Arkansas school

funding and that there was no rational basis for the disparity in available school funds among poor and wealthy school districts under Arkansas' school funding system. The court further concluded that the school funding system violated Article 14, § 1, of the Arkansas Constitution by failing to provide a "general, suitable and efficient system of free public schools." Two problems were pointed out by the 1994 Order: (1) school districts were allowed to keep excess tax revenues raised locally, thereby producing funding variances; and (2) state aid under Act 1 of 1994 did not cure the disparities in per pupil expenditures.

The chancery court stayed the effect of its decision for two years to give the Arkansas General Assembly time to implement a constitutional system "in conformity with this opinion." On December 21, 1994, the chancery court modified its first order slightly with two additional orders and repeated the two-year stay to give the General Assembly an opportunity to enact a constitutional system "in conformity with this opinion." The court also cited authority from other as support states for its stay.[13] The three orders will be referred to in this opinion as the 1994 Order.

On March 6, 1995, the chancery court refused to award Lake View attorneys' fees, because no common fund had been established as a result of counsels' efforts. Also, in 1995, the General Assembly passed three acts in an attempt to comply with the 1994 Order:

I. Act 916 -- Levied an income tax surcharge of ten percent against residents in a school district which failed to pass the base millage for school funding.[14]

II Act 917 -- Repealed the old funding system; required the Board of Education to

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[13] The chancery court cited *Carollton-Farmers v. Edgewood Indep. School Dist.*, 862 S.W.2d 489 (Tex.1992); *Helena Elementary School Dist. 1 v. State*, 784 P.2d 412 (Mont. 1990); *Edgewood Indepen. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

[14] This court subsequently found Act 916 of 1995 unconstitutional on other grounds. *See Barclay v. Melton*, 339 Ark. 362, 5 S.W.3d 457 (1999).

review minimum standards of accreditation and develop a definition for what constitutes an adequate education; and required that all school districts levy the base millage and that the State Treasurer supplement school district revenues to meet the base millage level.

III. Act 1194 -- Appropriated funds for grants and aids to local school districts, special programs, and vocational technical education for the biennium.

Hereinafter in this opinion, the three acts will be referred to as the "1995 legislative acts."

On March 11, 1996, this court dismissed an appeal by the State of Arkansas, which had contested the constitutional bases of the 1994 Order and its statistical analysis of equity. *See Tucker v. Lake View Sch. Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530 (1996). In that case, we held that because the chancery court stayed the effect of its order for two years to give the General Assembly an opportunity to act in conformity with the 1994 Order, this constituted a deferral by the chancery court in granting relief. We concluded that there was no final order for our review:

> By the terms of the [1994 Order], Lake View could request further hearings at the end of two years to determine if the new funding system conforms to the chancellor's ruling, or had the State failed to take any action at all. Lake View's rights in this matter have not been concluded and they have no way to put the chancellor's directive into execution without further proceedings before the trial court; the requirements for finality are thus not met.

Tucker, 323 Ark. at 697, 917 S.W.2d at 533.

In 1996, Lake View filed its third and fourth amended complaints. In the third amended complaint, Lake View asked for a declaration that Act 917 of 1995 was

unconstitutional under the Arkansas Constitution's equal protection article (Article 2) and its general education article (Article 14). The fourth amended complaint repeated allegations that Acts 916 and 917 of 1995 were unconstitutional and requested class certification of all generally affected persons in the state. On August 22, 1996, the chancery court certified the class of affected persons as all school districts in the state, students and parents of students in all school districts, school board members of all school districts, and school district taxpayers who have paid taxes to support the public school system.

On August 13, 1996, the chancery court entered a scheduling order which included the setting of a trial "on compliance with this Court's previous orders" to be held over seven days in November 1996.

On November 5, 1996, Amendment 74 to the Arkansas Constitution was passed by a vote of the people. This amendment amended Article 14, § 1, of the Arkansas Constitution and provided a base millage rate of twenty-five mills for all school districts. It further specifically allowed variances in funding among the school districts and authorized school districts to levy additional taxes above the base millage rate for maintenance and operation.

On November 18, 1996, the chancery court entered three orders in which (1) the judge of the chancery court who heard the case in 1994 and entered the 1994 Order recused; and (2) the court postponed the compliance trial because the seven days allotted would not be sufficient time to conduct the trial.[15] In a third order, the chancery court found:

> 2. The Arkansas Assembly enacted Acts 916 and 917 in 1995 to establish a new school funding system. A presumption exists that Acts 916 and 917 are constitutional.
>
> 3. Plaintiffs have the burden of going forward with the

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[15] Judge Annabelle Clinton Imber assumed a position on the Arkansas Supreme Court in January 1997.

> evidence and the burden of proving that the newly enacted school funding system is unconstitutional.
>
> 4. The enactment of a new school funding system and new statistical data constitute new facts. Therefore, the doctrine of *the law of the case* is not applicable, and the scope of the trial will not be limited to those issues raised at the previous trial of this cause. Nor will the trial be limited to compliance with this Court's previous order.
>
> 5. The scope of the trial will be affected and controlled by the pleadings file (sic) by the parties in this cause.

The case was then reassigned to a new judge of the chancery court.

On December 2, 1996, Lake View petitioned the chancery court for a writ of mandamus directing that this matter be set down for a full hearing on whether the State of Arkansas had complied with the 1994 Order and for a declaratory judgment. No immediate action was taken on that motion.

In April of 1997, Act 1307 of 1997 and Act 1361 of 1997 (hereinafter the "1997 legislative acts") became law. Act 1307 amended or repealed the former school funding system. It further set out the calculations of what millages may be used to meet the base millage rate of twenty-five mills and set out a system for public school revenues and expenditures, including what a general, suitable, and efficient system of education should include. Act 1361 appropriated funds for grants and aids to local school districts and for special programs for the next biennium.

On May 29, 1997, Lake View filed a fifth amended complaint in which it contested the constitutionality of the 1995 and 1997 legislative acts under Article 2 (equal protection) and Article 14 (general education) of the Arkansas Constitution and the Fourteenth Amendment of the U.S.

Constitution and prayed that the chancery court declare that the State of Arkansas is violating the 1994 Order. On June 6, 1997, the State of Arkansas moved for a dismissal of the *fourth* amended complaint under Rules 8(a) and 12(b)(6) of the Arkansas Rules of Civil Procedure.[16] On June 12, 1997, the chancery court entered a scheduling order in which it set a deadline of August 14, 1997, for Lake View to file further amendments to the complaint. On August 20, 1997, Lake View filed a motion to extend the filing time for a new complaint, and on September 5, 1997, the chancery court denied the motion as untimely. On September 8, 1997, Lake View filed a sixth amended complaint praying that the 1995 and 1997 legislative acts be declared unconstitutional "under federal and state standards." The State of Arkansas moved to strike the sixth amended complaint as untimely.

On October 30, 1997, the chancery court struck the sixth amended complaint and noted that there had been no "substantive strides" in the case since the order denying attorneys' fees on March 3, 1995. The court set a trial for January 27, 1998, through February 8, 1998. It also allowed Lake View ten days to cure conclusory allegations in its fifth amended complaint. On November 3, 1997, the chancery court allowed Lake View until November 21, 1997, to comply with the October 30, 1997 order or to file "some other pleading under which the plaintiffs wish to proceed." On November 21, 1997, Lake View filed an eighteen-page petition to show cause why the State of Arkansas should not be held in contempt of court for failure to comply with the 1994 Order. In that petition, Lake View measured the 1995 and 1997 legislative acts and Amendment 74 against the yardstick of the 1994 Order and asked the chancery court to order the State to provide it with financial information regarding public school funding, after which the court should hold the State in contempt for noncompliance. On December 5, 1997, the State of Arkansas moved to dismiss Lake View's petition to show cause under Rule 8(a) and 12(b)(6) of the Arkansas Rules of Civil Procedure.

On January 29, 1998, counsel for the State of

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[16] The motion was later amended to reference the fifth amended complaint.

Arkansas and Lake View presented the chancery court with an Agreed Order approved by all counsel, including the Office of the Arkansas Attorney General. The salient parts of the Agreed Order were:

> III. A pool of money has been created by the efforts of Lake View. Since the 1994 Order, there has been an increase in funding of at least $65 million in each of the fiscal years 1996-97 and 1997-98, totaling approximately $130 million.
>
> IV. The parties agree that upon application of Lake View the chancery court may order reasonable attorneys' fees and costs to be paid.
>
> V. Upon resolution of the attorneys' fees and cost issue, Lake View shall dismiss this case with prejudice.
>
> VI. Dismissal of the case with prejudice shall act as a bar to all claims by the Lake View class and interveners that the 1995 and 1997 legislative acts violate the federal or state constitutions or federal or state statutes.

On February 2, 1998, Lake View filed a petition for attorneys' fees in which it requested a fee award of $10.25 million or, alternatively, fifteen percent of $130 million.

On February 5, 1998, an order approving notice to class members was signed by the chancery court, calling for a fairness hearing on the proposed Agreed Order. Depositions of two practicing attorneys, Carrold E. Ray and Richard F. Hatfield, who favored payment of the requested attorneys' fees, were taken and filed with the court.

On February 20, 1998, the American Civil Liberties Union filed an objection to the Agreed Order based on the brevity of the comment period and the dismissal by class representatives of all claims regarding the constitutionality of the 1995 and 1997 legislative acts. According to the ACLU, class members were receiving nothing substantive from the

settlement. The Little Rock School District and the Pulaski County Special School District also objected to payment of attorneys' fees from funds allocated to their respective districts. Dr. Winston Simpson of the Bryant School District disagreed that $130 million resulted from Lake View's efforts. On March 25, 1998, the State of Arkansas responded to the various objections and urged the chancery court to sign the Agreed Order. The State pointed out that what was before the court was an Agreed Order by the parties and not a settlement agreement.

The State of Arkansas also filed a prehearing brief which included an argument that the State of Arkansas had complied with the 1994 Order by enacting the 1995 and 1997 legislative acts. Amendment 74 had also passed as well. The State's brief advised the chancery court that support for the Agreed Order was almost universal among class members, and a transcript of a Legislative Council meeting held on January 29, 1998, was attached in which the full Legislative Council approved the Agreed Order. During the Legislative Council's meeting, Tim Humphries of the Attorney General's office stated that the Governor directed the Attorney General to "pursue with the settlement."

On March 20, 1998, and April 1, 1998, hearings were held before the chancery court on matters relating to the Agreed Order. At the March 20, 1998 hearing, the court noted that it had "great concern" about barring future litigation under the Agreed Order. At the April 1, 1998 hearing, the chancery court found that the ACLU had standing. The chancery court then refused to approve the Agreed Order. In doing so, the court alluded to its concern about barring future litigation. With respect to Lake View's counsel, the court stated that they had performed a "historic service" and need to be "paid handsomely." It was their efforts, according to the court, that led to the State's "getting a fair school funding formula in place." The court urged the parties to settle the attorneys' fees issue. It concluded that if the court could award fees, it would, though it bothered the court that school districts that did not benefit from the lawsuit might have to pay part of the fees. After the ruling, counsel for the State of Arkansas announced that the State stood by the Agreed Order and that the case involved whether the State had complied with the 1994 Order by enacting the 1995 and 1997 legislative

acts and with the passage of Amendment 74.

On April 3, 1998, Lake View requested the chancery court to determine reasonable attorneys' fees and "adjudicate the matter in its finality." On April 6, 1998, a hearing on attorneys' fees occurred before the chancery court in which the court repeated that Lake View's counsel "need to be rewarded." Counsel for the State of Arkansas contended that the 1994 Order was moot but affirmed the Agreed Order recitation that a $130 million fund was created by Lake View's efforts. Counsel for the Little Rock School District argued that the 1994 Order was moot owing solely to the fact that a new school funding system was now in place. The chancery court announced the figure of $7 million as attorneys' fees for purposes of notifying the class members of a settlement.

On April 9, 1998, the Attorney General's office for the State of Arkansas raised objections to attorneys' fees for Lake View. At an April 10, 1998 hearing, the trial court referred to an "immunity argument" that the Attorney General had raised. Also on that date, the chancery court approved an order of notice to the class of an award of attorneys' fees in the amount of $7 million. The notice provided that after payment of the fees, the case would be dismissed as moot. Numerous comments from class members were received, both opposed to and in favor of the settlement, though the majority of comments opposed the proposed fee for attorneys.

On May 22, 1998, a hearing was held on Lake View's request for attorneys' fees. Bill Goodman, assistant director for tax and fiscal research of the Legislative Council, testified that Act 917 of 1995 was enacted in response to the 1994 Order and that general revenue surpluses were realized in fiscal years 1994-95, 1995-96, and 1996-97. Michael Stormes, Administrator of the Office of Budget of the Department of Finance and Administration, also testified about surpluses for the last three fiscal years and stated that the State of Arkansas had a $20 million fund for payment of unanticipated claims against the State. Dr. Charles Venus, a consulting economist and member of the Governor's Council of Economic Advisors, testified that over the last five fiscal years, underfunded school districts had received considerable funds as a result of Lake View's efforts and the 1994 Order. Dr. Venus took issue with the position of Tristen Green, systems coordination analyst for

the Department of Education, that any benefit derived from the Lake View lawsuit was minimal. According to Dr. Venus, the increased funds received by the poorer school districts since 1994 was considerable.

On June 8, 1998, the State of Arkansas responded to Lake View's letter briefs on attorneys' fees, urged that both the American Rule and sovereign immunity prevented payment of any fees, and asked the chancery court to cut off further argument on the matter. On June 12, 1998, Lake View tendered its reply to the State's assertion of sovereign immunity.

On August 17, 1998, the chancery court entered its final order on the matter. It found that Lake View's fourth amended complaint and show-cause petition were moot because Amendment 74 had changed the standard for the school funding system and allowed funding variances among the school districts. The court stated that the same analysis applies to the legislation passed by the General Assembly in 1995 and 1997. The court added that the complaint and show-cause petition should be dismissed for failure to state a claim, because the 1995 and 1997 legislative acts are presumed constitutional and no facts were alleged supporting lack of a rational basis for those acts.[17] In this regard, the chancery court noted that Lake View's show-cause petition did assert that findings made in the 1994 Order were violated, but concluded that those findings "*[m]ay* necessarily have changed and *may not be* applicable today." (Emphasis ours.)

With respect to burden of proof, the chancery court stated that the State of Arkansas had the burden of proving that it had complied with the 1994 Order, but that the 1995 and 1997 legislative acts were presumed constitutional. According to the court, this meant that Lake View had the burden of proving that "there is no rational basis for the current legislation." The chancery court added: "Because the new statutes and constitutional amendment could be construed by the Court as a response to the 1994 Orders, the Orders themselves provide a rational response for the new funding

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[17] The chancery court specifically found that Lake View's show-cause petition was a "pleading" as contemplated by its previous order.

formula."

Regarding attorneys' fees, the chancery court rejected Lake View's legal theories for paying fees (1) under the Arkansas Civil Rights Act, (2) under a theory of illegal exaction, and (3) under the common fund or common benefit theories. It further concluded that sovereign immunity under Article 5, § 20, of the Arkansas Constitution barred recovery of fees against the State. Finally, the court refused to entertain Lake View's waiver or estoppel arguments relating to sovereign immunity on the basis that the brief raising these points must be struck as untimely.

As previously indicated in this opinion, Lake View posits multiple bases for reversing the final order of the chancery court. We believe that two of those points have merit. We do not agree with Lake View, however, that the chancery court was required to sign the Agreed Order. Approval of the court is required for a class action compromise. *See* Ark. R. Civ. P. 23(e). We do not view court approval as a rubber stamp but rather as action entailing discretion by the trial court. *Cf. Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978). There was no abuse of discretion by the trial court in connection with this point.

II. Compliance Trial

Lake View contends that without a trial on the constitutionality of state initiatives since 1994, there is no basis for the chancery court's finding of mootness and failure to state a claim. We agree.

We begin with the observation that all parties and the chancery court apparently agree that the 1994 Order is still viable. No one contends that the 1994 Order has lapsed due to the failure to have a compliance trial after the first legislative acts were enacted in April 1995. Rather, the issue is whether the 1994 Order has any relevancy in light of the fact that the State's school funding formula has changed since 1994. The chancery court concluded that the mere fact of these legislative and constitutional changes rendered the 1994 findings obsolete.

We cannot subscribe to that conclusion. It would

take an extraordinary leap of faith to assume that the mere passage of a new school funding formula resolves all issues relating to disparities in the school funding system set out in the 1994 Order. Surely, Amendment 74, which allows funding variances among school districts due to local taxes, does not by itself resolve disparities in per pupil expenditures and opportunities under the State Constitution's equal protection clauses. Correcting such disparities lay at the heart of the 1994 Order. *See also DuPree v. Alma School Dist. No. 30, supra.*

Even assuming that Lake View has the burden of proving that the subsequent acts and Amendment 74 do not correct the disparities in treatment set out in the 1994 Order, it should be afforded an opportunity to make its case. As best we can determine, Lake View assiduously amended its pleadings after each set of legislative enactments and pushed for the matter to be scheduled for trial.

This brings us to the Agreed Order. There is no doubt that Lake View agreed to dismiss the case and forego future litigation if its attorneys' fees and costs were paid. But the chancery court refused to sign the order because it barred future contests on the unconstitutionality of the school funding system. The court also refused to approve attorneys' fees of $7 million, following Lake View's agreement that the case was moot. At that point, the agreement among the parties had fallen through, and the parties were back to square one on the compliance issue. Under these circumstances, Lake View was entitled to move on with its cause of action and press for a compliance trial.

There is another facet of the chancery court's decision that bears mention. Were this court to affirm that court's decision on grounds of mootness and failure to state a claim, our decision could be viewed as binding precedent on the issue of whether the 1995 and 1997 legislative acts and Amendment 74 corrected the disparities in pupil expenditures and pupil opportunities. Thus, any future contest to the constitutionality of the state funding system based on these changes would be barred. The State of Arkansas suggests that this might be an issue best left for another day. But this case cries for finality and resolution. We believe that a compliance trial and decision by the chancery court on whether the disparities in treatment noted in the 1994 order have been

corrected so as to pass constitutional muster is the best way to achieve those goals. Without a compliance trial and the chancery court's analysis and decision, we are loathe to conclude that mere changes in the school funding system warrant a dismissal.

We reverse and remand for a trial to take place as soon as is practicable.

III. Attorneys' Fees

We next agree with Lake View that the chancery court erred in denying attorneys' fees in this case. As a starting point, we conclude that the chancery court was correct that Arkansas follows the American Rule that attorneys' fees are not chargeable as costs in litigation unless permitted by statute. *See, e.g., Love v. Smackover Sch. Dist.*, 329 Ark. 4, 946 S.W.2d 676 (1997); *Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986); *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986).

This state, nevertheless, has recognized exceptions to that rule. One of those exceptions occurs when substantial benefits are afforded a business corporation, even when the benefit is not pecuniary and no fund has been created. *See Millsap v. Lane, supra.* In *Millsap*, the issue of the appropriate award of attorneys' fees centered on the economic benefit received by Millsap Processed Foods (MPF). At issue was the correct value of MPF land, building, and assets. This court decided that Millsap's derivative suit on behalf of MPF preserved a value of over $540,000 in corporate assets. We, therefore, increased the attorneys' fees based on the economic benefit to MPF resulting from counsels' efforts.

The concept employed in *Millsap* is analogous to what is at issue in the instant case. Here, there is no question but that a substantial economic benefit has accrued not only to the poorer school districts as a direct result of Lake View's efforts but to the state as a whole. With the gradual elimination of disparities in funding and opportunities for students and with the passage of Amendment 74, education in the State unquestionably has benefitted. The chancery court acknowledged that through Lake View's efforts, the State was getting a fair school funding formula. And Tim Humphries of

the Attorney General's Office told the chancery court that the State of Arkansas stood by the language in the Agreed Order even after the court refused to sign it. Also, at the April 6, 1998 hearing, James M. Llewellyn, Jr., on behalf of the State advised the chancery court that "at least One Hundred Million and probably more" was created by the effects of Amendment 74 alone and that "all of us still stand on the Agreed Order recitation that there was [a] One Hundred and Thirty Million Dollar fund created." Mr. Llewellyn further advised the chancery court that the court should reconsider the Agreed Order because "we all believe that you're the proper person to say what is a reasonable attorneys' fee." In addition to counsels' statements, there was testimony from state officials and a consulting economist at the May 22, 1998 hearing that revenues for the public school fund had increased dramatically since 1994, following the passage of the 1995 and 1997 legislative acts and Amendment 74. That the State derived a substantial benefit from the efforts of Lake View's counsel is beyond dispute.

The State of Arkansas now urges this court to conclude that regardless of that benefit and the representations by counsel for the State, the sovereign-immunity clause of the State Constitution (Article 5, § 20) bars any recovery for attorneys' fees. The State is correct that Article 5, § 20, provides that the State shall never be a defendant in any of her courts. Moreover, this court has said that tapping the State's treasury for payment of damages will render the State a defendant. *See, e.g., Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998). Here, it is the State's treasury that would pay either on a pro rata basis from revenues allocated to those school districts that benefitted from the Lake View litigation or from the State coffers. Thus, the State's treasury would ultimately be liable for legal fees. We hold that the sovereign-immunity doctrine applies to this case.

We turn then to the question of waiver or consent. It is axiomatic that the State of Arkansas can voluntarily waive a sovereign-immunity defense. *See, e.g., Newton v. Etoch, supra; State of Arkansas Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997); *State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996). In addition, the State can consent to being sued. *Ozark Unlimited Rehab. Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998). We conclude that when the

State of Arkansas signed off in two published notices to the class members advocating that attorneys' fees be paid and continued to push for payment of attorneys' fees even after the chancery court refused to sign the Agreed Order, it waived its sovereign-immunity defense to payment of those fees. We do understand that the State was seeking resolution of this litigation by supporting payment of those fees, but we are hard pressed to reconcile published notices to class members supporting fees and representations to the chancery court to the same effect with a later claim of immunity.

We recognize that the trial court refused to consider the waiver issue on grounds that it was raised too late by Lake View. Letter briefs had been submitted by Lake View on attorneys fees, and the State of Arkansas then filed its brief in response. In its brief, the State argued the sovereign-immunity defense and prayed that no more briefs be filed. Lake View responded four days later and countered the sovereign-immunity defense. It is that reply brief that the chancery court refused to consider. We conclude that the chancery court erred in this regard. Lake View should have been allowed to counter the sovereign-immunity defense. To hold otherwise would allow the State to argue a defense and then effectively foreclose a response from the other side. Furthermore, based on the State's motion to strike, *both* the State's brief in response and Lake View's reply were untimely.

We emphasize that this is a unique case with a unique set of circumstances. By upholding an eventual award of attorneys' fees today, as we do, we are not sanctioning attorneys' fees in all public interest litigation or endorsing a new exception to the American Rule. Nor are we advancing a particular method for paying those attorneys' fees, such as a contingent fee based on the economic benefit or the lodestar method. We further emphasize that we are wedded to no figure for attorneys' fees. All of that is for the chancery court to decide. We are simply holding that in this case, an economic benefit did accrue to the State of Arkansas due to Lake View's efforts and attorneys' fees should be awarded. Accordingly, we reverse the chancery court's decision denying attorneys' fees and remand for a determination of reasonable fees, after the compliance trial is completed. We leave it to the chancery court to determine what are reasonable fees, after taking into consideration all of the circumstances of this case.

See Chrisco v. Sun Indus., Inc., 304 Ark. 227, 800 S.W.2d 717 (1990). Because the State has benefitted, we hold that the State should pay the fees awarded.

Reversed and remanded.

SPECIAL ASSOCIATE JUSTICE CAROL DALBY concurs.

SMITH, J., concurs in part; dissents in part.

GLAZE, J., dissents.

IMBER, J., not participating.

CAROL DALBY, Special Justice, concurring.

I agree with the majority that the chancery court erred in failing to hold a compliance trial and in failing to award attorneys' fees. I concur because I believe additional clarification on the issue of attorneys' fees needs to be addressed.

Under the American Rule (which Arkansas follows) a litigating party, whether successful or not, must pay its own attorney's fee, unless a statute, contract, or judicial exceptions provide otherwise. Arkansas has recognized exceptions to this rule as noted in the majority opinion. Two of those exceptions under which an award of attorneys' fees in this case could be granted are the common-fund and the common-benefit exceptions. For the reasons set forth below, I believe the common-benefit exception should be applied to award attorneys' fees calculated by the lodestar method.

The common-fund exception permits the granting of attorneys' fees and other costs of litigation when a plaintiff is successful in creating, increasing, or preserving a fund which benefits an ascertainable class. The court, in exercising its equity jurisdiction may grant fees and costs by directing payment from the fund. *Newberg on Class Action*, Sec. 13.52 (3rd ed. 1992). In the case now before us, the evidence (despite the assertions of counsel in argument before the chancery court) is clear that the existing fund for school funding was increased, but no new fund was created nor preserved. It follows that any award of attorney's fees based on the

common-fund exception should be based on the increase in that fund and should be taxed against those specific districts that received an increase in state funding. This, of course, would tax those who could least afford it (i.e., the poorer school districts) which makes its application contrary to the purpose of the fee-shifting exception.

If, however, the chancery court does determine that an award of fees is warranted under the common-fund exception, I urge it to calculate the amount of fees based on the agreement made by the attorneys when they agreed to take the case. It appears that plaintiffs' attorneys were at one point satisfied to be paid a contingent of any settlement or judgment that Lake View received as per the employment contract entered into by the parties on September 3, 1998, some six years after the initial filing of this lawsuit. There certainly was nothing in the record to indicate a fee agreement prior to that time. Now, they are urging upon this Court, as they did in the chancery court, that they are entitled to a contingent fee from all monies now available to all school districts because of the legislative acts and Amendment 74. Their position is contrary to their own agreement. If they are to receive attorneys' fees at all under the common-fund exception, then they should be limited to that amount the Lake View School District recovered as per the fee agreement filed in the trial record at page 1239. Alternatively, I would urge the chancery court to apply the lodestar method to calculate attorneys' fees. This method would be particularly appropriate in this case since the first contingency-fee agreement was not entered into until September 3, 1998. How did plaintiffs' counsel expect to be paid during the first six years of litigation? It could not have been on a contingent basis since there was no writing stating such. *See* Model Rules of Professional Conduct, Rule 1.5.

The common-benefit exception is often used interchangeably with the common-fund exception, but there are subtle differences and it is those differences that determine who becomes responsible for payment of attorneys' fees. Under this exception the court is permitted to award attorney's fees from a defendant if the plaintiff's action results is a substantial benefit to the class but does not create a monetary fund from which fees might be awarded. *Newberg on Class Actions*, Sec. 13.52 (3rd ed. 1992). There is no doubt that the State of Arkansas has benefitted and will continue to

benefit by providing equality in education for all of its citizens and not just for those who reap the benefits of education by virtue of where they reside. The majority eludes to a "substantial economic benefit" accruing to the State as a whole. As noble as this statement is and in reality how true it may be, the record is devoid of any evidence as to the "substantial economic benefit" the State has received and no evidence has been offered upon which a percentage fee could be calculated. The only type of measurable economic benefit has inured to the poorer school districts, the effect of which is discussed above. I believe that the State has and will benefit as a result of plaintiffs' efforts by having better-educated citizens. It is under this exception I would grant attorneys' fees against the State. For the reasons set forth below, I am convinced that the proper calculation of attorneys' fees under this exception and under the unique facts of this case should be by the lodestar method.

The lodestar method of fee calculation relies on the time and services that an attorney spends on a lawsuit, rather than the granting of a fee based on a percentage of the recovery. *Lindy Brothers Builders v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973), *aff'd* in part and vacated, 540 F.2d 102 (3rd Cir. 1976). In *Lindy*, the court stated the purpose of a fee award in common-fund cases is "to compensate the attorney for the reasonable value of services benefitting the underrepresented claimant." 487 F.2d at 167. The court must look to the hours reasonably expended multiplied by a reasonable hourly rate. Id. This Court recognizes that time spent on a case is "an important element to be considered in determining the reasonable value of an attorney's services." *Powell v. Henry*, 267 Ark. 484, 487, 592 S.W.2d 107 (1980); *Millsap v. Lane*, 288 Ark. 439, 443, 706 S.W.2d 378 (1986). This application is particularly appealing here since the attorneys cannot be paid a percentage of the true benefit to the citizens of this State -- better education.

I am hard pressed to find any basis upon which the plaintiffs' attorneys should be compensated in the millions of dollars for their efforts. Plaintiffs' attorneys should be required to account to the chancery court and the citizens and taxpayers of this State (the class) as to what they expended in time and services in this lawsuit before the chancery court can determine a reasonable fee, as required by the Model Rules of

Professional Conduct.

LAVENSKI R. SMITH, Justice, concurring in part; dissenting in part.

I write separately to dissent in part and concur in part. I join the dissent as to the mootness of the instant appeal. I, too, find no authority in Arkansas law for a compliance trial. The statutory and constitutional scheme upon which the plaintiffs based their suit no longer exists. Plaintiffs may well have a valid complaint based upon the subsequently enacted laws but that should be a different case.

However, I join the majority and the concurrence on the issue of entitlement to attorneys' fees. As the prevailing party in an action that resulted in a substantial benefit to the class they represented, the plaintiffs should be entitled to attorneys' fees. I join the concurrence in preferring the lodestar method for calculation of those fees.

TOM GLAZE, Justice, dissenting.

This case has taken on a life of its own. It began in 1992, and with this court unnecessarily continuing further trial and review of the matter, it will predictably continue at least another two or more years.

In my opinion, the trial court should be affirmed for the reasons it found and others. The trial court recognized its predecessor court in 1994 entered orders holding the Arkansas school funding formula unconstitutional. However, since those orders, Amendment 74 to the Arkansas Constitution was adopted in 1996 and five legislative acts were passed in 1995 and 1997, which altered the school formula. In short, Arkansas's school funding system, as it exists today, is indisputably different from the one found unconstitutional in 1994. Amendment 74 and the acts passed in 1995 and 1997 are presumed constitutional and render this appeal moot.

The majority court seems to agree with Lake View School District that the district is entitled to a "compliance trial" -- which apparently is for the purpose of determining the constitutionality of the laws enacted since 1994, and whether those acts have cured the unconstitutional disparities the chancellor found earlier. Neither the trial court, nor our

court, has the authority or jurisdiction to hold "compliance trials." It is telling that the majority mentions no citation of authority that provides for such trials. In fact, our court defined its limited role in such matters in *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983). Similar to the case here, school districts brought suit in *Dupree*, charging that the state's financing system of its schools was unconstitutional because its financing of the state's educational needs was inadequate to rectify the inequalities based on widely varying local tax bases. The districts further contended that the state's system actually widened the gap between the property-poor and property-wealthy districts. The trial court agreed with the districts, found the system unconstitutional, and the *Dupree* court affirmed; but in doing so, our court delineated its limit of judicial interpretation when addressing such constitutional issues. The court stated as follows:

> The dispositive answer is simply that *this court is not now engaged in -- nor is it about to undertake -- the "search for tax equity" which defendants prefigure.* As defendants themselves recognize, *it is the Legislature which by virtue of institutional competency as well as constitutional function is assigned that difficult and perilous quest. Our task is much more narrowly defined: it is to determine whether the trial court committed prejudicial legal error in determining whether the state school financing system at issue before it was violative of our state constitutional provisions guaranteeing equal protection of the laws* insofar as it denies equal educational opportunity to the public school students of this state. *If we determine that no such error occurred, we must affirm the trial court's judgment, leaving the matter of achieving a constitutional system to the body equipped and designed to perform that function.* (Emphasis added.)

In the present case, the chancellor, by her November 9, 1994 order, performed her judicial duty by entering her 1994 orders, declaring the funding system violative of the Arkansas Constitution. She further correctly recognized that it was the duty of the General Assembly to provide for a system of free public schools, and that the trial court should not dictate the elements of that system. Our court has never sanctioned a procedure whereby a trial court, after ruling a statute unconstitutional, could retain jurisdiction of the case until the General Assembly enacts a new measure the trial court believes meets constitutional muster. Here, when the chancellor interpreted existing law and rendered an opinion that the school funding formula was unconstitutional, her duty ended. As for the changes made by the 1995 and 1997 laws, those laws will require new legal arguments and proof which may be tested in new and separate actions.[18]

In rendering her decision, the chancellor also denied Lake View School District the injunctive relief it requested, and instead stayed her decision for two years in order to give the General Assembly time to implement a funding system in conformity with her opinion. The chancellor exceeded her authority and jurisdiction with these directives. Certainly, the chancellor could issue a stay order while the case was pending on appeal, but that is all that Arkansas law allows. *See* Ark. R. Civ. P. 62(d) and Ark. R. App. P.--Civ. 8; *see also Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).[19]

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[18]Obviously districts or taxpayers may file suit later questioning the constitutionality of any or all of the General Assembly's enactments if they are satisfied those new acts fail to end the unconstitutional disparities in the state's school funding formula.

[19]I note that the chancellor cited to a Montana case, *Helena Elementary Sch. Dist. 1 v. State*, 784 P.2d 412 (Mont. 1990) (supplementing and amending *Helena Elementary Sch. Dist. 1 v. State*, 769 P.2d 684 (Mont. 1989)), where that state's supreme court held it had equitable power to postpone the effect of its earlier opinion which held that state's funding of public schools unconstitutional. However, that court offered no actual authority to support the "equitable power" proposition. Even if the Montana decision had been based on a sound legal footing, the Montana court did not empower a trial court to withhold the effectiveness of its constitutional ruling. Clearly, if trial courts can be said to be empowered to postpone the effectiveness of their decisions, such authority could play

Lake View School District's remedy was to cross appeal the chancellor's refusal to grant the district the injunctive relief it sought, so the district could enforce the orders it had obtained. Nor did Lake View question on cross appeal the chancellor's authority or jurisdiction to stay the 1994 orders entered in Lake View School District's favor. My alluding to this jurisdiction issue should be of no surprise to the litigants in this appeal, since this court in *Tucker v. Lake View Sch. Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530 (1996), pointed out that "the matter of jurisdiction may again arise if further proceedings before the trial court result in another appeal of this case."

In my opinion, this case ended when (1) the chancellor entered her opinions in 1994, (2) the Lake View School District failed to cross appeal, and (3) the direct appeal was dismissed. If Lake View School District had appealed the 1994 orders and pursued the injunctive relief to which it was likely entitled, the Lake View School's counsel then could have sought any attorneys' fees which they believed were due them.

As to the attorneys' fees issue, I am doubtful that counsel for Lake View School District are in a position to prove their entitlement at this stage of the litigation because they failed to establish the required class action or a common fund prior to the chancellor's decision in 1994. Again, if counsel had been unjustifiably denied such class action by the chancellor by her 1994 decision, that decision should have been challenged on cross appeal by the Lake View School district. Regardless, I respectfully, but strongly, disagree with the majority opinion wherein the court stretches the *Millsap* holding whereby this court allowed attorneys' fees to the plaintiffs in an action involving private shareholders and their business corporation and the corporation received some economic benefit as a result of the litigation. *See Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986). Even if the *Millsap* case involving private parties and a private entity should be extended to an action against governmental entities (an extension with which I disagree), the Lake View School District, to qualify under such a common-benefit theory, was

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havoc with appeals – as has been the situation in this case.

required to show that a common fund or benefit was created for an identifiable class of beneficiaries. Here, the chancellor correctly held that there was no such pool of money; but even if there had been a pool, it was impossible to determine which of the class members benefitted and which did not. In short, Lake View School District made no attempt to delineate which school districts, taxpayers, and students benefitted, and which did not do so.

For the above reasons, I would affirm.

IN THE SUPREME COURT OF ARKANSAS

LAKE VIEW SCHOOL DISTRICT NO. 25
OF PHILLIPS COUNTY, ARKANSAS,
ET AL. APPELLANTS

VS. NO. 01-836

MIKE HUCKABEE, GOVERNOR
OF THE STATE OF ARKANSAS,
ET AL. APPELLEES

APPELLANTS' ATTORNEYS' SEPARATE PETITION FOR REHEARING ON ATTORNEY'S FEES ISSUE

Counsel for the Appellants were literally stunned by the apparent sea change in the perception of how the members of this Court view them and their legal services in this class action case, as exemplified by the difference in the tenor of this Court's decisions in *Lake View II* and *Lake View III*. Though the Court has acknowledged, in both decisions, that the Appellants' counsel have created very substantial monetary and non-monetary benefits for all members of the Plaintiff class (and for the State of Arkansas, as a whole), this Court has now chosen to abandon its normal standards of review and has imposed severe limitations upon the attorneys' fees awarded to the Appellants' counsel by the trial court in this class action. Notwithstanding, the Appellant's counsel respectfully request this Court to reconsider, clarify and modify the Court's Opinion with regard to the attorney's fee issue, in the following respects.

I. APPELLANT'S COUNSEL RESPECTFULLY REQUESTS THIS COURT TO MODIFY IT'S OPINION WITH REGARD TO THE LIMITATION ON THE ATTORNEY'S FEE AWARDED TO THEM

The Appellant's counsel request the members of this Court to reconsider and eliminate (or at least, moderate) the severe limitations imposed by the Court upon the attorneys' fee awarded to them by the trial judge, based upon the

following alternative grounds:

A. Reinstatement of Flat Fee Award Requested. In *Lake View II*, this Court held that the Appellants' counsel were entitled to recover an attorneys' fee directly from State, because, in this "public interest" class action, they had created substantial monetary and non-monetary benefits for the State of Arkansas as a whole, and that this fee could be set using either the contingent fee percentage or lodestar methods. After Judge Kilgore properly exercised his discretion, considered all of the factors mandated by this Court for setting a proper and reasonable fee (*Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 SW 2d 717 (Ark. 1990) and *Powell v. Henry*, 262 Ark. 763, 592 SW 2d 107 (Ark. 1980)), and awarded the Appellants' counsel an attorney's fee on a "hybrid" basis that totaled $9,338,035, this Court, on appeal, has rejected Appellants' counsel's request that the fee awarded to them be increased in amount. Instead, the Court has abruptly changed the standards that it decreed could be applied and has proceeded to apply very limited and rigid standards for awarding attorneys' fees under only the lodestar method, which limiting standards are apparently now applicable only in "public interest" cases involving challenges to public school funding. The Appellants' counsel request that an increased fee be awarded to them by this Court, in line with fees awarded in other class action cases, or at least the trial court's original fee award be reinstated by this Court, based upon the following considerations:

(1) The State of Arkansas is to Be Treated Like Any Other Litigant. When the State of Arkansas has waived its sovereign immunity, as it has here, this Court has long decreed that the State must be treated as any other litigant and the State has only the rights of any other private suitor. See, *Arkansas Game & Fish Commission v. Lindsey*, 299 Ark. 249, 771 SW 2d 769, 770 (Ark. 1989) and *Arkansas Highway Commission v. Partain*, 193 Ark. 807 103 SW 2d 53, 54 (Ark, 1937). Therefore, this case is like any other "civil rights" class action case, where the State has been found to have taken actions that have systematically denied constitutionally guaranteed rights to the complaining class members. Here, the State and its general funds have no equitable or special status that would require them to be granted a special protection in this "public interest" suit. The fee awarded here should be paid from the

$20.0 million "litigation fund". (general revenues) that the DF&A maintains to pay judgments and fee awards that the State may incur, because of its unconstitutional actions.

(2) A $130 Million "Minimum Monetary Benefit" Has Been Established. Appellants' counsel respectfully submit that the State never appealed from the factual determination that a "minimum monetary benefit" of $130. million was created, but that this Court has, *sue sponte*, improperly readdressed that factual issue, after it had been settled for more than two years. There is ample evidence in the record to prove that Appellants' counsel helped create a $130.0 million "minimum economic benefit" for the members of the Plaintiff class, and that this fact is not, at this late date, "fodder for speculation." This "minimum monetary benefit" (where the actual monetary benefit created is much, much larger) was evidentially established at the May 22, 1998 hearing by the testimony of Mr. Bill Goodman, Assistant Director, Arkansas Legislative Council, and by the "special language" that the General Assembly included in Section 50 of Act 1362 of 1997 (PX-T). By this "special language," the General Assembly required the ADE to actually expend (and not be allowed to reserve) $65.0 million dollars more in the next two (2) fiscal years than the agency had expended in the previous fiscal year. This Court, in *Milberg, Weiss, Bershad, Hynes, Lerach, LLP v. State*, 342 Ark 303, 28 SW 2d 842, 854 (Ark. 2000), also specifically held "[t]he result was the creation of a fund of $130.0 million." Thus, Appellants' counsel respectfully submit that the creation of this "minimum economic benefit" of $130 million was a proven fact in this case, accepted by the parties, the trial court and this Court, until this Court chose to repudiate this factual finding in its latest Opinion.

(3) This Court's Severe Limitation of the Attorney's Fee Award Here Has Created a "Second Class" Status for School Funding Litigation. Twenty two years ago, this Court held, in *Powell v. Henry, supra*, 592 SW 2d, at 111:

> An important factor in our consideration of our fee allowance in this case is the realization of the inadequate compensation will cause attorneys who are competent to handle this type of litigation to shun it, or if they accept it, fail to devote sufficient time to adequately

> prepare or present the case. This is an appropriate consideration in matters of this sort.... The individual rate payer ordinarily can not afford to employ counsel because attorney's fees and other expenses can be expected to exceed his perspective recovery. If attorneys do avoid employment such as that accept by attorneys in this case because they can not expect to be adequately compensated, even if they are successful, there would be the few cases where excess charges would ever be refunded.

This is the standard adopted by this Court for the award of attorneys' fees in "public interest" cases as an incentive to attract competent counsel to undertake the high risk representation of parties (such as the representative Plaintiffs in this class action case) in cases were the class is seeking to protect the constitutional rights of the public (*not* the government, since it is *always* the government's actions that are violating the constitutional rights of the public in "public interest" litigation). Appellants' counsel have provided the Court with actual opinions and orders in 23 prior Arkansas class action cases (especially the decision of Judge Kilgore in the companion *Melton* case, involving educational tax funds that grew out of the *Lake View* case, where a fee of 33 ⅓% of the $1.6 million common fund was awarded to Oscar Stilley; as well as the *Lake Side School District* and *Hicks* cases that also involved public school funds), where attorneys' fees were awarded by the percentage method (*not* the lodestar method) in every single one of these 23 cases. The effect of the result of this decision in *Lake View III* dwarfs the results achieved in *all* of the decisions recorded in the other 23 cases combined.

This Court has now, after the fact, abandoned (and repudiated) the specific guidelines that it gave to Judge Kilgore (in its *Lake View II* decision) to use in determining his award of a reasonable attorneys' fee, on remand, in this specific case. This Court has apparently now accepted the State's specious argument that this Court's well developed standards for awarding attorney's fees in "public interest" class action cases involving "public funds" should *not* be used as precedent in this school funding challenge, but, instead, *only* a minimum attorneys' fee should be awarded to these

counsel using *only* a restricted version of the lodestar method. This "new" exception to the general standards (that has been adopted or asserted here by the Court, for use in school funding cases), will *only* benefit the State (i.e., the party that is the "wrongdoer" here). For all practical purposes, the Court's actions in substantially reducing the attorneys' fee awarded will effectively shut the courthouse door in the future to the "property poor" school districts (like Lake View), where their constitutional rights are being violated by the State. This is because these "property poor" school districts cannot afford to fund this type of constitutional challenge themselves, on an hourly fee basis, and no competent attorney, in the future, will assume the inherent risks of contingency in such representations based only upon the hope of securing an attorneys' fee, if they succeed, and then *only* if the State's sovereign immunity is waived in any new suit. Thus, the Court's promise in *Lake View III*, not to shy away from considering any future violation by the State, in a new class action suit, is a "hollow promise.".

There is no real difference between the cited "illegal exaction" class action cases and the *Lake View* case. *All* of these cases involve "public funds" and the protection of these "public funds" from governmental abuses. There is no rationale basis for this Court's authorizing a percentage attorneys fee to be awarded in *all* of these other "public interest" cases (where the counsel were all of the Caucasian race), while denying even the possibility of applying a percentage based fee to the Appellants' attorneys in this case (where all counsel are African-American). It is therefore respectfully suggested to the Court that (since the ruling by this Court in *Lake View III* has so severely and arbitrarily limited the attorneys' fee awarded here) this Court has created a clear "second class" status for these attorneys who have several times successfully challenged the State's public school funding system., over a 13 year period of time. These actions by this Court raise obvious questions about there being a denial of equal protection and due process for the Appellants' counsel, under the provisions of the 14th Amendment of the U.S. Constitution, and Article 2, §§2, 3, 8 and 13 of the State Constitution.

This Court's ruling, on the fee award, should be withdrawn and an increased fee award, or at least the

attorneys fee as set by Judge Kilgore in this Final Order of May 25, 2001, should be reinstated, in accordance with the normal incentive standards set by this Court in *Powell v. Henry, supra,* and the established standards of this Court's normal "abuse of discretion" review process.

B. Even if The Lodestar Method is to be Utilized, the Court Has Erred in So Severely Limiting the Attorneys Fee to be Awarded in This Case. If only the lodestar method for setting an attorneys' fee can be utilized in this case, the Appellants' counsel submit that further modifications need to be made by this Court to its Opinion, to assure that a more reasonable fee is awarded to the Appellants' counsel in this case.

(1) There Is No Factual Basis to Support the Use of a $150 per Hour Rate. There is absolutely nothing in the evidentiary or pleading record in this case to establish that the rate of $150 per hour is a sound basis for determining a "reasonable attorneys' fee" to be awarded in this case, using the lodestar method. Judge Kilgore arbitrarily determined that he would use a $150 per hour rate for setting an attorneys' fee award for the Appellants' counsel in his Final Order of May 25, 2001, but he did *not* cite to any evidence or testimony as his basis for using a $150 per hour rate in this case.

Therefore, this Court erred in its *Lake View III* Opinion (Slip Op. 49), when it held that the $150 per hour amount utilized by Judge Kilgore was "supported by expert testimony of two attorneys." Neither Richard Hatfield nor Carrold Ray (the Appellants' counsels' expert witnesses) ever testified as to any hourly rate being applicable in this class action case. The State's counsel "totally defaulted" on their opportunity to offer any evidence (expert or otherwise), as to what the State believed to be a reasonable hourly rate for any attorney's fee in this case, at the May 22, 1998 hearing on the Petition for Award of Attorney's Fees, or at any other time Judge Kilgore inquired of them on this issue.

(2) The Risk Undertaken and Results Achieved Are Not Reflected in a Fee Based Upon a Rate of $150 Per Hour. The real risk of these attorneys not being paid for their legal services was very great when the Appellants' counsel undertook this representation in 1989, and when this suit was

filed in 1992. Even after their successful efforts in 1994, the risk of recovering nothing was the greatest for them in August of 1998, when Judge Kilgore dismissed *both* the substantive claims of the class members *and* denied the Attorneys' Fee Petition in his Final Order of August 17, 1998. Except but for the perseverance of the Appellants' counsel, in assuming *all* of the risk and *all* of the costs attendant with an appeal from that Final Order (on *both* the substantive *and* attorneys' fee issues), there would never have been decisions by this Court in *Lake View II* and *Lake View III*. Without that appeal, the school district and student members of the Plaintiff class would never have been entitled to receive the very substantial and unprecedented monetary and non-monetary benefits that will surely now flow to them (and to the State as a whole), because of this Court's decision in *Lake View III*. Instead, without that appeal, this "public interest" case would have been closed out in 1998 and public school funding in Arkansas would have continued to be both inadequate and inequitable, because the State of Arkansas would have continued to utilize the inadequate and inequitable public school funding system that the General Assembly adopted in 1995 and 1997.

(3) The $150 Per Hour Rate Does Not Reflect Current Standards. This Court should take "judicial notice" (as has been requested by the Appellants' counsel in a separate Motion filed today) of the fact that, even in normal ERISA litigation in the federal courts of Arkansas (in the fall of 2002), attorneys fee awards are made at hourly rates of at least $225 per hour to attorneys who have no more experience than do the Appellants' counsel in this case. This Court should also note that in similar "public interest" litigation challenging public school funding in the state courts of Alabama, the Alabama Supreme Court (over five (5) years ago), in the case of *James v. Alabama Coalition for Equity, Inc.*, 713 So. 2d 937 (Ala. 1997), affirmed the trial court's earlier determination that interim attorneys fees totaling $3,599,735 (for less than three (3) years of legal services) should be awarded to the counsel representing the successful challengers to the public school funding system in Alabama. The fee was awarded on the "lodestar method" by the Supreme Court in Alabama, but *only* because the jurisdictional basis for the case was held to be the federal "civil right's act" (42 U.S.C. § 1983). (See, the three member dissent in *James* that discusses the use of the percentage fee method). There are an incredible number of

factual and procedural similarities common between that *James* case and this *Lake View* case(where the fee was set by the trial court at 10% of the benefit created), and the members of this Court are referred to the cited 1997 Alabama Supreme Court decision in *James*, as a guide for awarding a reasonable fee in this case. The fees set in that *James* case were obviously much greater than the fee resulting to the Appellants' counsel because of this Court's actions that slashed the amount of the award of attorneys' fees here by two-thirds. See also, the published hourly rates awarded in similar desegregation cases involving public schools and higher education in Alabama (where the decisions were rendered seven (7) and nine (9) years ago, respectively), were $275 per hour in the case of *Knight v. State of Alabama*, 824 F. Supp. 1029 (N.D. Ala, 1993) and of $250 and $225 per hour in the case of *Lee v. Randolph County Board of Education*, 885 F. Supp. 1526 (M.D. Ala., 1995).

Here, in this *Lake View* case, the Appellants' counsel have spent upwards of 13 years in preparing, filing and successfully litigating the important constitutional issues presented in this "public interest" class action case, without receiving even $1.00 in compensation. They have now had their legal positions sustained for the third time in this case. With this Court's drastic reduction of the attorneys' fee awarded in this case, the Appellants' counsel will receive the total amount of $3,088,035,00 for 13 years of legal work, which amount is far less than Alabama counsel received for about three (3) years' legal work in the very similar *James* case, where the State system of public school funding system of Alabama was challenged and also held to be unconstitutional.

Under these type of facts, the United States Supreme Court has held that an award of attorneys' fees, under the lodestar method (as used in "civil rights cases" (42 U.S.C. § 1988)), should be made using the "current" hourly rates. This is so that the counsel receiving the fee award will not be severely penalized, financially, for the long delay in receiving the fee for the legal services that they rendered years before. See, *Blum v. Stenson*, 465 U.S. 886 (1984); *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Blanchard v. Bergeron*, 489 U.S. 87 (1989); and *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

Alternatively, and only alternatively, if this Court, upon reconsideration, determines that the lodestar method is

the *only* method that it will use to determine an attorneys fee to be awarded in this "public interest" class action case, the Appellants assert that this Court should modify its stay and immediately remand the separate attorneys' fee issues in this class action case back to Judge Kilgore for the specific purposes of:

(1) ordering the State of Arkansas to immediately pay the Appellants' counsel the amount of costs separately awarded to them and to pay the amount of attorneys' fees represented by the $150 per hour rate, and

(2) with further specific instructions, holding an evidentiary hearing to determine if an hourly rate, at a higher dollar figure, is currently applicable for the award of attorneys fees to similar counsel in similar complex litigation in the courts of this State, and, if so, to modify and increase the fee award to the Appellants' counsel in this case to a more reasonable amount for the entire period covered by this suit.

II. THIS COURT SHOULD MODIFY ITS DECISION TO CONFIRM THAT INTEREST HAS ACCRUED ON THE FEES AND COSTS AWARD FROM THE DATE OF THE ORDER ENTERED BELOW

Judge Kilgore did not rule directly on the Appellants' counsel's request that interest be imposed, at the rate of 10% per annum (as provided by Ark. Code Ann. § 16-65-114(a)), on the attorneys' fee that he awarded to them, though he did rule that interest would accrue, unless a court ruled otherwise. This Court should amend its Opinion in *Lake View III* to clearly state that interest at 10% has accrued on the amounts of the attorneys' fee and cost reimbursement ordered in this case, from May 25, 2001, the date the Final Order was entered in the trial court below.

III. THIS COURT SHOULD MODIFY THE THIRTEEN MONTH STAY ENTERED IN THIS CASE, SO AS TO ALLOW THE SEPARATE ATTORNEYS' FEE ISSUES TO BE REMANDED TO THE TRIAL COURT, IMMEDIATELY, FOR FURTHER PROCEEDINGS BEFORE THE TRIAL JUDGE.

The Court must modify the 13-month stay entered in its *Lake View III* Opinion, to allow the attorneys' fee issues to be immediately remanded to Judge Kilgore for further proceedings on these issues. Appellants' counsel (who won this case eight (8) years ago) must not be further deprived of even the limited fees and cost reimbursement awarded to them, while the General Assembly addresses the substantive issues of this Court's recent Opinion over the next year. Besides the immediate payment by the State of these awards, this Court should also direct Judge Kilgore to address and decide the following two matters:

A. Determination of Reasonable Hourly Rate. If the Court rules, on rehearing, that the lodestar method for setting a fee is the only method that must be used in this case, then this Court should direct Judge Kilgore to hold a further evidentiary hearing, on remand, to determine if any hourly rate in excess of $150 per hour should have been utilized in settling the attorneys' fee award in this case, and, if so, what that hourly rate should be. Judge Kilgore should then modify the fee award in this case to reflect that increased hourly rate for the entire period that this suit has existed.

B. Additional Fee Award for Subsequent Legal Services. Judge Kilgore should, as part of an evidentiary hearing on remand, determine what additional attorneys' fees and costs the Appellants' counsel are entitled to receive for the legal services they have rendered for the Plaintiff class, since the submissions of their respective Affidavits(about November 1, 2000), so that they may also be compensated for their legal services rendered in this appeal and otherwise. Such additional fee award should be computed at the hourly rate as may be determined by Judge Kilgore (as requested in subpart

"A" above), and those additional fees and costs should also be ordered to be paid to the Appellant's counsel by the State of Arkansas.

CERTIFICATION

The undersigned special counsel for the Appellants' attorneys hereby certifies that he believes there is merit to the grounds set forth in this Separate Petition for Rehearing on Attorneys Fee Issues and that such Petition for Rehearing has not been filed for purposes of delay.

Respectfully submitted,

By: /S/
Eugene G. Sayre

SPECIAL COUNSEL
FOR APPELLANTS' ATTORNEYS

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
)
In the Supreme Court) **SCT.**

BE IT REMEMBERED, That at a session of the Supreme Court of the State of Arkansas, begun and held in the City of Little Rock, on December 19, 2002, amongst others were the following proceedings, to wit:

01 00836

Lake View School District No. 25 et al. Appellants

vs. Appeal from Pulaski Chancery Second Division-92-5318

Mike Huckabee, Governor et al. Appellee(s)

State appellee's petition for partial rehearing, certificate of merit, and brief in support is denied.

Appellant's separate petition for rehearing on substantive issues is denied.

Appellant's separate petition for rehearing on attorneys' fees issues is denied.

State defendant's motion for award of costs against Lake View and its counsel if denied. See per curiam this date.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 19th day of December, 2002.

/s/

Clerk

IN THE SUPREME COURT OF ARKANSAS

LAKE VIEW SCHOOL DISTRICT NO. 25
OF PHILLIPS COUNTY, ARKANSAS,
ET AL. APPELLANTS

VS. NO. 01-836

MIKE HUCKABEE, GOVERNOR
OF THE STATE OF ARKANSAS,
ET AL. APPELLEES

APPELLANTS' ATTORNEYS' MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF CURRENT ATTORNEY FEES AWARDED IN FEDERAL ERISA LITIGATION

Comes now the special counsel for the Appellants' counsel in this class action appeal, pursuant to the provisions of the Rule 2-1 of the Rules of the Supreme Court of Arkansas, and pursuant to the provision of Rule 201 of the Arkansas Rules of Evidence, and does hereby respectfully request the members of this Court to take judicial notice of the fact that, on October 25, 2002, the Honorable William R. Wilson, United States District Judge for the Eastern District of Arkansas, in the cause styled *John Webb V. Goodyear Tire and Rubber Co. and AETNA Life Insurance Company,* Docket No: 5:01CV209WRW, awarded attorney's fees in the amount of $225 per hour to Leon Marks, Attorney at Law, Little Rock, Arkansas, and to William C. Frye, Attorney at Law, Little Rock, Arkansas, in that federal court proceeding involving ERISA issues.

As grounds for this Motion, the undersigned counsel would respectfully show the members of this Court, as follows:

1. One of the issues raised on appeal in this case by the Appellants' counsel and the State is the determination of a reasonable attorneys' fee that should be awarded to the Appellants' counsel in this case.

2. This Court, in its Opinion on appeal in this case (which Opinion was entered herein on November 21, 2002) modified the attorneys' fee awarded to the Appellants' counsel by the trial court judge, by substantially reducing the amount of the attorney fee award, restricting the method of computing the fee award to the lodestar method, and accepting that the hourly rate of $150 per hour as the factual basis for the award of an attorneys' fee to the Appellants' counsel.

3. The Appellants' counsel have filed a Separate Petition for Rehearing on the Attorneys' Fee Issue, wherein the Appellants' counsel have alleged that there are no evidentiary facts in the record or the pleadings in this case, where there is any evidence of what constitutes a reasonable hourly rate for litigation such as is involved in this case, let alone an hourly rate of $150 per hour.

4. The Appellants' counsel also are asserting in this appeal that the use of an hourly rate of $150 per hour by this Court, in its Opinion of November 21, 2002, to modify the attorneys' fee awarded by the trial court to the Appellants' counsel has resulted in the determination of an attorneys' fee award in this case that is unreasonably low, in amount, since the hourly rates applicable to the type of legal services charged by attorneys with similar experience and ability, in matters of complex litigation, within the courts of the State of Arkansas, are substantially in excess of $150 per hour.

5. The listing of enrolled counsel licensed to practice before the Arkansas Supreme Court, as maintained by the Clerk of this Court, reflects that Leon Marks is an attorney of Little Rock, Arkansas who is licenced to practice before the Bar of the Supreme Court of Arkansas, and that Mr. Marks was admitted to practice before this Court on August 26, 1976 and that Mr. Marks' assigned Bar Number is 76175. Likewise, such list in the Office of the Clerk of this Court reflects that William C. Frye is an attorney of Little Rock, Arkansas who is licenced to practice before the Bar of the Supreme Court of Arkansas, and that he was admitted to practice before this Court on August 23, 1983 and that Mr. Frye's assigned Bar Number is 83069.

6. A copy of Judge Wilson's Order awarding attorney's fees, dated October 25, 2002, and certified by the Clerk of the United States District Court for the Eastern District of Arkansas, in the case styled *John Webb V. Goodyear Tire and Rubber Co. and AETNA Life Insurance Company*, Docket No. 5:01CV209WRW (in which Order the fee award at a rate of $225 per hour was made by the federal court to Messrs. Marks and Frye) is attached hereto as Exhibit A.

7. The attached Order of Judge Wilson of the United States District Court for the Eastern District of Arkansas should be judicially noted by the members of this Court, pursuant to the provisions of Rule 201 of the Arkansas Rules of Evidence, as evidence of, and support for. the position asserted by the Appellants' counsel, in the Separate Petition for Rehearing on Attorneys' Fee Issues, that a real question of fact still exists in this case, as to whether the rate of $150 per hour, or a higher hourly rate, should be applied in determining the award of a reasonable attorneys fee to the Appellants' counsel in this "public interest" class action case, when the Court uses the lodestar method for awarding a reasonable attorneys' fee.

8. This Court, as an appellate court, may exercise its discretion and take judicial notice, under the provisions of Rule 201 of the Arkansas Rules of Evidence, of facts not presented during the trial of this case, especially where the party is asserting the insufficiency of the evidentiary record upon which a ruling of this Court was based, as noted in this Court's prior decision in *Houston v. State*, 293 Ark. 492, 739 S.W. 2d 154 (Ark. 1987).

WHEREFORE, the undersigned special counsel for the Appellants' counsel in this proceeding requests that the members of this Court take judicial notice, pursuant to the provision of Rule 201 of the Arkansas Rules of Evidence, of the facts set forth in this Motion and of the award of attorneys' fees made by the United States District Judge in the Order that is attached hereto as Exhibit A.

Respectfully submitted,

By: /S/
Eugene G. Sayre
SPECIAL COUNSEL FOR APPELLANTS' ATTORNEYS

(ATTACHMENT)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHN WEBB **PLAINTIFF**

vs. **5:01CV-00209-WRW**

GOODYEAR TIRE & RUBBER CO. and
AETNA LIFE INSURANCE COMPANY
DEFENDANTS

ORDER

Pending is plaintiff's motion for post judgment award of fees, costs, interest and specific findings. Defendants have filed papers opposing plaintiff's request for prejudgment interest. Defendants suggest an alternative procedure regarding specific findings requested by the plaintiff. Plaintiff's cost request is not disputed by defendants.

I will start with the so-called "Westerhaus[20] factors" which are as follows:

1. The degree of the opposing parties culpability or bad faith;

2. The ability of the opposing parties to personally satisfy an award of attorney's fees;

3. Whether an award of fees against the opposing parties would deter other persons acting under similar circumstances;

4. Whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA

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[20] Lawrence v. Westerhaus, 749 F.2d 494 (8th Cir. 1984).

plan or to resolve a significant legal question regarding ERISA itself; and

5. The relative merits of the parties' positions.

While I think AETNA's denial was somewhat tenuous, I do not find that it was in bad faith. On the other hand, AETNA is "culpable" assuming this word to mean "blameworthy," because, in my opinion, AETNA did deny benefits and hang onto this denial too long after it became relatively clear that plaintiff was entitled to benefits. So, the first *Westerhaus* factor weighs slightly in favor of plaintiff.

AETNA concedes that it can pay an award of attorney's fees, so I will move on to the third factor. I think that an award of attorney's fees in this case will deter AETNA, and others similarly situated, from continuing to deny benefits particularly when there has been a Social Security Administration determination in favor of plaintiff and substantial other evidence which supports a finding of plaintiff's disability within the meaning of the contract.

The fourth factor goes to the defendants.

The fifth factor, "relative merits of the parties' positions" goes to the plaintiff. While this was not a clam dunk for plaintiff, he had the long end of the stick by a considerable sight.

I turn now to the amount of attorney's fees. While it is clear that there were "collaborative" efforts on behalf of plaintiff's lawyers, the time records also reflect some "duplicative" efforts.

I am satisfied also, after studying the time records, that there is some fat in the time records of plaintiff's counsel. A good example -- cited by defense counsel – is the time charged for drafting the rather straightforward complaint. Good lawyers should be thorough, but it seems to me that this pleading received a little too much attention.

I think a rate of $225.00 per hour – vice $250.00 per

hour – is a reasonable rate for both the plaintiff's lawyers. I might note that I am surprised to see that Mr. Bacon has charged only $135.00 per hour in this litigation. I would have thought that a trial lawyer of his recognized skill and experience would have charged considerably more, particularly, as I recall, this was about what he was charging when I left the practice nine years ago. Be that as it may, defense counsel's hourly rate is not controlling. Lawyers have many reasons for setting an hourly rate and there is no need to examine those here. One thing that is certain is that fees for plaintiff's counsel are problematic, particularly in the ERISA cases, while defendants' fees are certain. I also note that plaintiff's affidavit points to the failure of defendants to mention the amount of time spent by its in-house attorneys who attended depositions or the amount of time spent by legal staff and the human resources department. For those reasons, among others, the hourly rate of defense counsel is only one factor to consider. Mr. Marks has supported his request with affidavit of adequate counsel practicing in the area.

To trim the fat from Mr. Mark's fee statement, I am reducing the hours expended to 85. So, on his original claim, he is awarded $19,125.00. On his supplemental claim, I am awarding him $225.00 per hour, and reducing his hours to 8, for an additional $1,800.00, giving him a total attorney's fee of $20,925.00.

Mr. Webb's rate is also reduced to $225.00 per hour, and his total hours are reduced to 45, giving him a total fee of $10, 125.00.

Reviewing the record for the cost reimbursement, it appears that Mr. Marks requests $2,112.50 and Mr. Fry requests $556.02.

The supporting affidavits reflect that the costs are reasonable, there is no objection to the request and it is reasonable in light of my experience. The award if granted.

The defendants correctly state the law on the issue of prejudgment interest and I exercise my discretion to grant it in this instance. In this case, it is necessary to provide

complete relief to the plaintiff for the wrongful denial of benefits. I adopt the interest calculation method set forth by the defendants and note that there has bee no objection to the method in the reply brief filed by the plaintiff.[21]

With respect to plaintiff's benefits defendants suggest the following steps "to proceed" forward (emphasis supplied):

1. Plaintiff and his counsel must provide both a statement under oath and proper documentation supporting such statement regarding his other income benefits, as required under the Plan.

2. Once plaintiff provides this information, AETNA will (a) provide to the court and defendants a calculation of plaintiff's monthly benefit using the information provided by plaintiff and the benefit calculation under the terms of the policy; and (b) provide an interest calculation.

3. To the extent the parties disagree with each other with respect to the calculation reference in 2, the court could order a briefing schedule or other necessary proceedings.

4. The court can utilize the information provided by the parties to make its specific findings.

I like this suggested approach for proceeding forward, so I adopt it. Plaintiff and his counsel must provide the information set forth in paragraph 1 just above within two weeks of the date of this order. If additional time is needed, plaintiff's counsel should forthwith fax a letter to me requesting an extension. The original of the letter should be filed with the clerk, and, of course, a copy should be sent to opposing counsel.

Plaintiff's motion to strike the affidavit of Michael J. Rosner is denied.

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[21] *Mansker v. Time Life Insurance Company* 54 F.3d 1322, 1330 (8th Cir. 1995)

CONCLUSION

The Court GRANTS the motion of the plaintiff for attorney's fees and costs in the amount set forth in this order. The plaintiff's motion for prejudgment interest is GRANTED and the calculation set forth by the defendant is adopted.

The plaintiff's motion to strike the affidavit of Michael J. Rosner is denied.

IT IS SO ORDERED THIS 24th DAY OF OCTOBER, 2002.

/S/

UNITED STATES DISTRICT COURT

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(A) FRCP ON 10-25-02 by /S/

IN THE SUPREME COURT OF ARKANSAS

LAKE VIEW SCHOOL DISTRICT NO. 25 OF PHILLIPS COUNTY, ARKANSAS, et al. APPELLANTS

VS. 01-836

MIKE HUCKABEE, GOVERNOR OF THE STATE OF ARKANSAS, et al. APPELLEES

ROGERS SCHOOL DISTRICT, NO. 30 AND BENTONVILLE SCHOOL DISTRICT NO. 6 OF BENTON COUNTY, AND LITTLE ROCK SCHOOL DISTRICT OF PULASKI COUNTY INTERVENORS

SUGGESTION OF DISQUALIFICATION

Comes now Lake View School District No. 25 by and through its attorney, E. Dion Wilson of Wilson Law Firm, P.A., and for their Suggestion of Disqualification, and states:

1. That the authority for the Suggestion of Disqualification is authorized by Rules of the Supreme Court 6.4, Canon 1, Canon 2, Canon 3(b)(1), and Canon 3(e)(1)(c) of the Arkansas Judicial Code of Conduct.

2. That in the prior adjudication of this cause, *Lake View v. Huckabee*, 340 Ark. 481 (2000), Justice Dalby served over the objections of the appellant, Lake View, as a Special Substitute Justice for the Honorable Imber.

3. That appellant, Lake View, objected or suggested disqualification of Justice Dalby in the prior case mentioned above and incorporates herein word for word all prior objections to the propriety of Justice Dalby sitting in this cause.

4. That additionally, it has come to the attention

and within the knowledge of Lake View and all citizens of the State of Arkansas who read the Arkansas Democrat-Gazette that based upon best information Special Justice Dalby was a member of the same religious congregation pastored by Rev. Mike Huckabee prior to his ascension to the office of Governor of the State of Arkansas.

5. That the combination of the following factors: (a) close personal and political relationship; (b) financial contributor to the Governor's past campaign efforts; and (c) a former member of the same worship body and not only a member of the same church but a parishioner of the then Rev. Mike Huckabee, are germane to the instant request.

6. The position of being a pastor or minister over a person suggests that Justice Dalby selected Rev. Mike Huckabee to be the person who would deliver the word of God to her and, such being the case, it leads to the inescapable conclusion that Justice Dalby trusted, listened to and believed in Mike Huckabee in a more than regular personal relationship that one would have as a friend.

7. That Justice Dalby in the previous aforementioned case of *Lake View v. Huckabee* wrote a concurring opinion in which she suggested or opined her method of the calculation of attorney's fees for the African-American attorneys who represent Lake View and the class certified by the court.

8. That in that opinion written by Justice Dalby, she has already shown her proclivity to be against the award of attorney's fees based upon a percentage basis and her proclivity to be against an award of attorney's fees that would result in the appellants being paid as she so succinctly stated in her opinion "in the millions of dollars for their efforts."

9. That at this point and time, the trial court, Honorable Judge Kilgore, has already awarded the appellants attorney's fees in excess of Nine Million Dollars, and Justice Dalby in her previous opinion has already stated on record that she is "hard pressed to find any basis for this type of award for attorney's fees."

10. That additionally, it is of note that the attorneys for the State -- the Attorney General's office – have in their

brief responding to the attorney's fees issue cited Justice Dalby's concurring opinion as persuasive dicta to request that this court adopt the lodestar method versus the percentage method in awarding attorney's fees.

11. That the citation by the Attorney General's office standing alone is troublesome but coupled with the fact that after their brief was filed with the Clerk's office of the Supreme Court, the public and the attorneys of record for Lake View and the class learned that Governor Huckabee, once again, appointed Justice Dalby to hear the *Lake View v. Huckabee* case.

12. That the appointment of Justice Dalby after she was extensively quoted in the appellees' brief on their position as to how attorney's fees should be calculated has the look and smell of impropriety. The public and all parties involved in this case are entitled to feel that the process of this court is untainted by any outside factors or influences. It has been quite often stated that the "look of impropriety is always greater than the impropriety itself."

13. That under the circumstances and all the factors enunciated above, it is incumbent upon the remaining six justices of this court to act affirmatively in the disqualification of Special Justice Dalby pursuant the authority of this court via Amendment 28 to the Arkansas Constitution.

14. That the school children of the State of Arkansas, taxpayers of the State of Arkansas and all citizens of the State of Arkansas have placed their trust in the court system, and this case being the most important case of its nature in the history of Arkansas should not be submitted to this court with Justice Dalby sitting as a justice under the cloud of impropriety.

15. That if the Supreme Court justices fail to disqualify Justice Dalby in this appeal, then each member of the court, in the interest of justice to the State of Arkansas and its citizens, should reevaluate themselves and consider whether it is proper for them to seat as justices in this case when they have failed to disqualify Justice Dalby who by law and facts is truly unqualified to serve.

16. That the Superintendent of the Lake View School District is African-American; the School Board of the Lake View School District is all African-American; and the attorneys representing Lake View School District are all African-American.

17. That the Superintendent and Lake View School Board have expressed to this attorney their material concerns that this case is being submitted to the present racial makeup of the court which does not have any its body any person of the environmental background or racial ancestry of the named appellants.

18. That vital to this cause is the determination of the rights of the poorest children in this State, and the poorest children in this State have faces of color.

19. That also vital to the issues on appeal in this case is the question of whether African-American lawyers can receive the same treatment as has been afforded to Caucasian lawyers in the granting of legal fees.

20. That the Superintendent and Lake View School Board request that this court would *en banc* recuse itself from this appeal pursuant to the constitutional authority of Amendment 28, if this court does not accept the suggestion of disqualification of Justice Dalby – which is a "no-brainer" – and that a new panel should be selected pursuant to the authority of Amendment 28 with seven members of the Court of Appeals division being specifically appointed to hear this case.

21. That the Superintendent and Lake View School Board feel that if Justice Dalby is not ordered recuse by this court, then there is no hope of this court rendering a fair decision to the Lake View and the class of appellants represented African-American attorneys.

22. That counsel of record, E. Dion Wilson, has spent an enormous amount of time which Superintendent Phillips of the Lake View School District counseling him about the suggestion of disqualification of Justice Dalby and possibly the whole panel. The Superintendent and the Board of Lake View request that this motion be filed, and I, E. Dion Wilson,

alone as attorney of record concur.

23. That I, E. Dion Wilson, attorney of record for Lake View School District and the class of appellants, have researched the appropriate law regarding disqualification of judges and believes that this motion has merit and is not presented to this court for waste or for any other improper reason.

24. That this motion represents the fortitude that the Lake View School District and its Superintendent possess, and it also represents the utmost zeal that I, E. Dion Wilson, have to represent my clients.

25. That almost every citizen, judge and attorney who read the article which appeared in the Arkansas Democrat-Gazette regarding Justice Dalby and the appointment by the Governor more than likely said to themselves "how can a person who is a defendant in a case appoint a person to hear his case and that person in which he appoints has been: (a) a financial contributor to his previous election campaign; (b) has been a parishioner in a church he has been the pastor or minister; (c) has sat on the previous case and rendered an opinion in which she has stated that she is hard pressed to find that the attorneys in this case desire a fee in the millions; and (d) then the same Governor who appoints her files in his brief through the State Attorney General's office extensive passages from Justice Dalby' previous opinion on attorney's fees. Then after that brief is filed, Justice Dalby is, once again, appointed to hear the case.

26. That Justice Dalby should recuse herself or be disqualified by this court in the interest of elementary impartiality and the appellants' concept of the appearance of impropriety. The interest of justice will be well-served by her disqualification.

WHEREFORE, Appellants pray for an Order of Disqualification of Justice Dalby or, alternative, that this court disqualify itself *en banc* so that a more cross-sectional and more representative panel can be selected from the Arkansas Court of Appeals; and for all other relief deemed just and proper by this court.

Respectfully submitted,

WILSON LAW FIRM, P.A.
Wilson, Valley & Etherly Ofc. Bldg.,
Suite 1
423 Rightor Street
Helena, Arkansas 72342

BY: /S/
E. DION WILSON

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

September 30, 2002

Eliott Dion Wilson
Wilson Law Firm, P. A.
423 Rightor Street
Helena, AR 72342

Re: 01 00836 Lake View School District No. 25 et al.
v. Honorable Mike Huckabee, Governor et al.

Dear Mr. Wilson:

The Arkansas Supreme Court made the following order today in the above styled case:

> "On suggestion for disqualification by Lake View School District No. 25, Special Justice Carol Dalby declines suggestion of recusal. The Court denies Lake View's motion to order her recusal, and each member of the Court denies the suggestion of recusal. Imber, J., not participating."

Sincerely,

/S/
Leslie W. Steen, Clerk

IN THE SUPREME COURT OF ARKANSAS

LAKE VIEW SCHOOL
DISTRICT NO. 25
OF PHILLIPS COUNTY,
ARKANSAS, ET AL.

APPELLANTS

VS. NO. 99-28

MIKE HUCKABEE,
GOVERNOR
OF THE STATE OF
ARKANSAS, ET AL.

APPELLEES

APPELLANTS' MOTION REQUESTING DISQUALIFICATION OF CERTAIN SPECIFIC ELECTED AND APPOINTED JUSTICES

Come now the representatives of the Appellant-Class of school districts, school board members, parents, students and taxpayers in the above captioned action, and the Appellants' counsel in the above captioned action, and, pursuant to the provisions of Rule 6-4 of the Rules of the Arkansas Supreme Court, do hereby respectfully request that:

> Chief Justice Arnold and Associate Justices Corbin and Glaze disqualify from further participation in any manner in ruling upon the merits of the substantive issues and the attorneys' fee issues presented on appeal by the Appellants and the Appellants' counsel; and
>
> Special Justice Dalby disqualify from further participation in any manner in ruling upon the merits of the substantive issues and the attorneys' fee issues presented on appeal by the Appellants and the Appellants' counsel.

As grounds for this Motion, the representatives of the Appellant-Class and the Appellants' counsel would respectfully show the members of this Court as follows:

1. Counsel for the Appellant-Class has been formally notified by the Clerk of this Court that the oral argument in this appeal has been docketed for January 27, 2000.

2. Counsel for the Appellant-Class has been notified by the Clerk of this Court that Associate Justice Imber has recused or disqualified from further participation in this case (Associate Justice Imber having been the Chancellor that decided the merits of the substantive issues raised on appeal in Orders entered in the Pulaski County Chancery Court in this case in November and December of 1994).

3. Counsel for the Appellant-Class has been notified by the Clerk of this Court that Carol Dalby, Texarkana, Arkansas, has been appointed by the Honorable Mike Huckabee, Governor, State of Arkansas, as a Special Justice to sit in place of Associate Justice Imber in this case, pursuant to the provisions of Article 7, § 9 of the Arkansas State Constitution.

4. Jimmie L. Wilson of Helena, Phillips County, Arkansas is the lead counsel for the Appellant-Class in the appeal of this case from the Orders of the Pulaski County Chancery Court. In disciplinary matters relating to the licensure of Jimmie L. Wilson, as an attorney at law by the Arkansas Supreme Court, Jimmie L. Wilson, as the named Third-Party Plaintiff and Counterclaimant, sued, among others, Associate Justices Donald Corbin and Tom Glaze, as named Third Party Defendants in an action in the United States District Court for the Eastern District of Arkansas styled *James A. Neal v. Jimmie L. Wilson,* Docket No. CIV-H-C-95-54, (E.D. Ark.). The decisions of that case are reported at 920 F. Supp. 976 (E.D. Ark., 1996), affirmed, 112 F.3d 351 (C.A. 8, 1997). Copies of the first pages of these two reported decisions (containing a list of the parties to that federal court action) are attached hereto as Exhibits A-1 and A-2. Only Associate Justices Corbin and Glaze (of all of the named Third-Party Defendant members of the Arkansas Supreme Court sued by Jimmie L. Wilson in this cited federal court action) remain as sitting Justices of this Court at this time.

5. The fact that Associate Justices Corbin and Glaze have been litigants opposing the Appellants lead counsel in federal court litigation that has occurred in the last three (3)

years, gives rise, under the provisions of Canon 3 E, of the Arkansas Code of Judicial Conduct, to at least there being an appearance of a conflict of interest for these two Associate Justices to pass judgment upon the merits of the substantive issues raised by the representatives of the Appellant class, or upon the attorneys' fee issues which will directly affect the Appellants' counsel, including Jimmie L. Wilson.

6. Another of the attorneys for the Appellant-Class in the appeal of this case is Roy C. "Bill" Lewellen, a practicing attorney from Marianna, Lee County, Arkansas. In 1985, Roy C. "Bill" Lewellen was charged with the alleged criminal offense of attempted witness bribery in the Circuit Court of Lee County, Arkansas, Docket No. 85-50, by then Prosecuting Attorney Gene Raff. Chief Justice W. H. "Dub" Arnold participated in the federal court case brought by Roy C. "Bill" Lewellen to have the federal court enjoin the state criminal proceeding against Roy C. "Bill" Lewellen in Lee County Circuit Court. Chief Justice Arnold testified as an expert witness for the state authorities regarding the propriety of this criminal prosecution of Roy C. "Bill" Lewellen. That state court criminal action filed in the Lee Circuit Court was eventually enjoined by Order of the United States District Court for the Eastern District of Arkansas, in the case styled *Lewellen, et al. v. Raff, et al.*, 649 F. Supp. 1229 (E.D. Ark. 1987), affirmed, 843 F. 2d 1103 (C.A. 8, 1988), opinion on rehearing, 851 F. 2d 1108 (C.A.8, 1988). Copies of the front pages of these three (3) reported decisions are attached hereto as Exhibits B-1, B-2 and B-3.

7. The active participation of Chief Justice Arnold in this criminal case involving one of the attorneys for the Appellant-Class presents at least the appearance of there being a possible lack of impartiality on the part of the Chief Justice. Therefore, under the provisions of Canon 3 of the Arkansas Code of Judicial Conduct, the Appellants and their counsel respectfully submit that Chief Justice Arnold should disqualify from further participating in passing judgment upon the merits of the substantive issues or attorneys' fee issues raised on appeal by the representatives o the Appellant-Class or the Appellants' counsel, including Roy C. "Bill" Lewellen.

8. Because Chief Justice Arnold and Associate Justices Corbin and Glaze have previously been actively involved in,

or named as parties to, federal and state court actions involving either the licensure of the lead counsel for the Appellant-Class or the attempted criminal prosecution of one of the counsel for the Appellant-Class, the members of the Appellant-Class and their counsel respectfully submit that Chief Justice Arnold and Associate Justices Corbin and Glaze should recuse and disqualify themselves from further participation in the appeal in this case. If such action is taken by these sitting Justices to disqualify from further participation in this case, then there will not even be the possible appearance of bias or impartiality among the members of this Court in the deciding of the important substantive issues and attorneys fee issues presented by this appeal.

9. These named Justices of the Arkansas Supreme Court should not pass judgment upon the substantive issues and attorneys' fee issues that have been raised on appeal by the representatives of the Appellant-Class and the Appellants' counsel, because of their prior personal involvement in cases involving several of the named counsel for the Appellants in this case.

10. The Honorable Mike Huckabee is the principal and lead Defendant-Appellee in this class action case, as the Governor of the State of Arkansas. The duly elected and serving President Pro Tempore of the Arkansas Senate and the Speaker of the Arkansas House of Representatives are also named as Defendant-Appellees in this case. Only the Honorable Winthrop Paul Rockefeller, Lieutenant Governor of the State of Arkansas, is not a named Defendant/Appellee in this case.

11. The substantive issues raised in this appeal directly involve matters relating to the constitutionality of legislative acts enacted by the Executive and Legislative Departments of the State of Arkansas to attempt to meet the constitutionally mandated funding by the State of Arkansas of its free public schools. Therefore, the Honorable Mike Huckabee, Governor of the State of Arkansas, is the lead Defendant/Appellee in this case. Governor Huckabee has been intimately and personally involved in the defense of this case by the named State Defendants, while he has served as Governor of this State.

12. Article 7, § 9 of the Arkansas State Constitution expressly provides as follows:

> In case all or any of the judges of the Supreme Court shall be disqualified from presiding in any cause or causes the court or the disqualified judge shall certify the same to the Governor, who shall immediately commission the requisite number of men learned in the law to sit in the trial and determination of such causes.

13. Pursuant to the provisions of Article 7, § 9 of the Arkansas State Constitution, the Honorable Mike Huckabee has been, in the normal course of events, requested by the Clerk of this Court to appoint a Special Justice to serve in the place of Associate Justice Annabelle Clinton Imber who has previously recused and disqualified from further participation in this case. Acting upon such request, the Honorable Mike Huckabee has appointed Carol Dalby of Texarkana, Arkansas to serve as a Special Justice in this case to participate (in place of Associate Justice Imber) in deciding the merits of the substantive issues and attorneys' fee issues raised on appeal by the representatives of the Appellant Class and the Appellants' counsel.

14. A review of the records maintained by the Secretary of State of the State of Arkansas, regarding campaign contributions to the Honorable Mike Huckabee in the Governor's campaign contribution reports filed for the most recent election of Governor of Arkansas (which election was held on November 7, 1998), reflects that Carol Dalby of Texarkana, Arkansas, on September 23, 1997, contributed $200.00 to the Honorable Mike Huckabee as a campaign contribution for Governor Huckabee's race for Governor. A copy of this portion of the campaign contribution records of the Honorable Mike Huckabee, filed on October 15, 1997, in the Office of the Secretary of State of the State of Arkansas, which document records and reflects this campaign contribution to Governor Huckabee from Carol Dalby of Texarkana, Arkansas, is attached hereto as Exhibit C.

15. Special Justice Dalby is presently employed as an Assistant District Attorney for Bowie County, Texas. In such

position, Special Justice Dalby is compensated for the performance of her legal services by either the State of Texas or Bowie County, Texas. Special Justice Dalby is not now, and has not been for the last three (3) years, actively involved in the practice of law in the State of Arkansas.

16. Under the "special and unique factual circumstances" provided by the alignment of the named parties to this appeal, where the Honorable Mike Huckabee is the primary Defendant/Appellee (as the Governor of the State of Arkansas), Governor Huckabee's appointment of Carol Dalby to participate as a Special Justice in this case (pursuant to the provisions of Article 7, § 9 of the Arkansas Constitution) causes the creation of a "constitutional crisis," because the provisions of Article 4, § 2 of the Arkansas State Constitution expressly require that there be a strict separation of powers of the three (3) separate departments of Arkansas state government.

17. These provisions of Article 4, § 2, that provide for the express separation of powers in the three (3) Departments of state government, should control over the provisions of Article 7, § 9, which latter provisions provide the grant of a ministerial power to the Governor to appoint Special Justices to sit on this Court, when an elected Justice disqualifies. The appointment of Carol Dalby as a Special Justice by Governor Huckabee (the primary Defendant/Appellee in this case) denies the "due process" protections guaranteed to the members of the Appellant-Class and the Appellants' attorneys by the provisions of Article 2, § 8 of the Arkansas State Constitution and the 14th Amendment of the United States Constitution. Clearly, the sitting Governor's appointment of Special Justices to sit in judgment on the merits of the issues presented on appeal in a case in which the Governor is a named party, and, as the head of the Executive Department of state government, has a direct interest in the outcome of the appeal, is an affirmative "state action" that breaches the "due process" rights and protections guaranteed to the Appellants and the Appellants' counsel by the cited provisions of the state and federal constitutions.

18. The provisions of Article 4, §§ 1 and 2 of the Arkansas State Constitution expressly provide that the powers

of state government shall be divided into three (3) distinct departments, i.e., legislative, executive and judicial. Article 4, §2 expressly states that no person or collection of persons of one department shall exercise any power belonging to the other department. If Chief Justice Arnold and Associate Justices Corbin and Glaze disqualify from further participation in this appeal (pursuant to this Motion filed by the representatives of the Appellant-Class and the Appellants' counsel), then, under the provisions of Article 7, § 9 of the Arkansas State Constitution, Governor Huckabee (as the lead Defendant/Appellee in this case) will have the power to appoint a majority of the Justices of this Court who will decide the merits of the important constitutional and precedential issues that are presented by this appeal regarding public school funding and the awarding of attorneys fees to counsel in return for their representation of "property poor" school districts in this type of "public interest litigation." Such action would clearly deprive the representatives of the Appellant-Class and the Appellants' counsel of their rights to the "due process" protections guaranteed to them by the provisions of Article 2, § 8 of the Arkansas State Constitution and the 14th Amendment of the United States Constitution.

19. Though the power of a sitting Governor to appoint men learned in the law to substitute for Justices of the Arkansas Supreme Court that have disqualified or recused in a case (under the provisions of Article 7, § 9 of the State Constitution) may not usually pose any "due process" problems or conflicts over the separation of powers (where the litigation is between parties that are private litigants), the "special or unique factual circumstances" that are presented by the alignment of the named parties involved and the substantive issues and attorneys' fee issues presented on appeal in this case do create an inherent conflict between these two provisions of the Arkansas State Constitution.

20. The sitting Governor, as the head of the Executive Department of the Arkansas state government, must not be permitted by this Court to appoint a majority of the Justices of the Supreme Court who will then render a controlling decision in a case involving the direct interests of the Executive Department, as well as the Legislative Department, of state government. Representatives of the Appellant-Class

and the Appellants' counsel respectfully submit that such action itself presents an even greater "appearance of possible impropriety or impartiality" in the exercise of the Judicial Department's functions, than do the issues raised previously by the Appellants and the Appellants' counsel regarding Chief Justice Arnold's, or Associate Justices Corbin's or Glaze's further direct participation in any phase of the appeal in this case.

21. To cure the "constitutional crisis" that is presented by the "special or unique factual circumstances" of the appeal in this case, the representative Appellant-Class and the Appellants' counsel respectfully request that the remaining sitting Justices of this Court exercise the Court's "inherent rule making and supervisory powers," under the provisions of Article 7, § 4 of the Arkansas State Constitution, to confer and appoint *only* elected and sitting members of the Arkansas Court of Appeals or elected Judges of the trial courts of this state, to fill the vacated positions of the recusing or disqualifying Justices of this Court, until a full panel of seven (7) Justices is secured to consider and rule upon the merits of the substantive issues and attorneys' fee issues involved in this appeal.

22. Alternatively, and only alternatively (to the extraordinary actions requested by the Appellants and the Appellants' counsel in paragraph 21, above), the representatives of the Appellant-Class and the Appellants' counsel suggest, on the record, that the Honorable Mike Huckabee, Governor of the State of Arkansas, should formally notify the Clerk of this Court that he has determined to recuse and disqualify himself, in this case, from exercising the power of appointment of Special Justices, under the provisions of Article 7, § 9 of the Arkansas State Constitution. Thereafter, if any Special Justices are to be appointed to sit for those Justices of this Court that may recuse or disqualify from further participation in this case, then, under those circumstances, the Honorable Winthrop Paul Rockefeller, the duly elected and acting Lieutenant Governor of the State of Arkansas, will be able to exercise the ministerial power to appoint Special Justices, under the provisions of Article 7, § 9 of the Arkansas State Constitution, until a full panel of seven (7) Justices will be available to consider and rule upon the merits of the substantive issues and attorneys' fee issues that

are presented by the appeal in this case.

WHEREFORE, the representatives of the Appellant-Class and the Appellants' counsel respectfully request that Chief Justice Arnold and Associate Justice Corbin and Glaze recuse and disqualify themselves from further participation in the appeal of this case, and that Special Justice Dalby also recuse and disqualify from further participation in this case, with the four vacancies on the Arkansas Supreme Court being filled by the remaining Justices from among the elected and sitting judges of the Arkansas Court of Appeals or the elected and sitting circuit judges or chancellors of the State, as an exercise of the inherent rule making and supervisory powers of this Court, pursuant to the provisions of Article 7, § 4 of the Arkansas Constitution, so that a full panel of seven (7) Justices will be available to hear and decide the merits of the substantive issues and attorneys' fee issues presented on appeal, without requiring the sitting Governor to appoint any Special Justices in this particular case.

Respectfully submitted,
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Marianna, AR 72360

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January 13, 2000

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Re: 98-29 Lake View School District No. 25 of Phillips County, Arkansas et al. Mike Huckabee, Governor of the State of Arkansas et al.

Dear Mr. Sayre:

The Supreme Court made the following order today in the above styled case:

> "Appellants' motion requesting disqualification is denied. Arnold, C.J., Graze and Corbin, JJ., and Special Justice Carol Dalby each deny request for disqualification."

Sincerely,

/S/
Leslie W. Steen, Clerk

ATTACHMENT A TO COMPILATION OF ATTORNEY FEE AWARDS IN COMMON FUND/COMMON BENEFIT CLASS ACTION CASES

(This Compilation of Attorney Fee Awards in Common Fund/Common Benefit Class Actions by Arkansas Courts was comprised of the actual opinions or orders of those Arkansas judges that made these attorney fee awards. The following reproduction of Attachment A to that Compilation summarized the pertinent information about dates, the current awarding of attorneys fee, the amount of the common fund/common benefit and the percentage and amount of each attorneys' fee award. This Compilation was filed of record in this case in the Chancery Court of Pulaski County, Arkansas, on May 17, 2001.)

ATTACHMENT A
EXAMPLES OF FEE AWARDS BY ARKANSAS COURTS IN COMMON FUND/COMMON BENEFIT CLASS ACTIONS

CASE	AMOUNT OF FUND OR BENEFIT	% FEE AWARD	FEE AMOUNT	COST AMOUNT
Millsap v. Lane Pope County Chancery Ct. Ark. Sup. Ct. Docket No. 85-209 (1986 Decision)	$ 540,000.00	78.33%	$ 422,977.50	$ 30,000.00+
Barnhart v. City of Fayetteville Washington County Chancery Ct. Docket No. E-89-1170 (1995 Decision)	4,623,991.00	58.00%*	2,702,920.30	Unknown

Klein v. Arkoma Production Co. U.S. Dist. Ct.** Docket No. 90-2060 (1998 Decision)	8,450,000.00	35.50%	3,000,000.00	225,000.00
Hales v SEECO, Inc. Sebastian County Circuit Ct. Docket No. CIV.-96-327(III) (1998 Decision)	93,500,000.00	35.00%	32,550,000.00	429,717.27
Eureka Diamond v. Priest Pulaski County Chancery Court Docket No. EQ 96-3768 (2000 Decision)	1,086,396.00	33.33%***	362,132.00	Unknown

CASE	AMOUNT OF FUND OR BENEFIT	% FEE AWARD	FEE AMOUNT	COST AMOUNT
Melton v. Barclay and Casteel v. Huckabee Pulaski County Chancery Court Docket No. OT 96-4824 and EQ 96-0014 (2000 Decision)	$ 1,652,157.58	33.33%	$ 550,664.12	$ 200.00
Williford v. Crittenden County Crittenden County Chancery Court Ark. Sup. Ct. Docket No.84-117 (1984 Decision)	106,467.43	30.06%	22,980.07	Unknown
Hawkins v. Parsons Saline County Chancery Court Docket No. E-93-957-1 (1995 Decision)	5,200,000.00	25.00%	1,300,000.00	Unknown

Hasha v. City of Fayetteville Washington County Chancery Court Docket No. E 91-1052 (1993 Decision)	$ 10,751,344.00	25.00%	2,687,838.00	7,500.00
ATA, Inc. v. Smith Pulaski County Chancery Court Docket Nos. E 89-385 and E 83-2360 (1991 Decision)	25,000,000.00	25.00%	6,250,000.00****	Unknown
Graham v. City of North Little Rock Pulaski County Chancery Court Docket No. E 81-3263 (1982 Decision) and E 83-2360	343,620.81	25.00%	85,905.05	Unknown

CASE	AMOUNT OF FUND OR BENEFIT	% FEE AWARD	FEE AMOUNT	COST AMOUNT
Cash v. City of Little Rock ***** Pulaski County Chancery Court Docket No. E 81-4165 (1982 Decision)	$ 1,265,000.00	25.00%	316,000.00	Unknown
Hicks v. City of Fayetteville Washington County Circuit Court Docket No. CIV 1997-500 (2001 Decision)	18,600,000.00	25.00%	4,650,000.00	Unknown
Maas v. City of Mountain Home Baxter County Chancery Court Docket No. E-96-9-1 (2000 Decision)	1,846,019.00	24.38%	450,000.00	Unknown
Daniel v. Jones White County Chancery Court Docket No. E 95-685 First (1999 Decision)	$ 2,200,000.00	22.05%	485,000.00	Unknown

Palmer v. Thompson Pulaski County Chancery Court Docket No. E 81-5749 (1985 Decision)	1,204,000.00	16.94%	204,000.00	Unknown
Lakeside School District v. Arkansas State Board of Education Pulaski County Chancery Court Docket No. 94-1106 (1994 Decision)	4,846,095.00	15.00%	726,914.00	Unknown
Bosnick v. Pledger Pulaski County Chancery Court Docket No. E 89-1451 (1993 Decision)	52,000,000.00	15.00%	7,800,000.00	28,494.00
Thorne v. Hartwick Pulaski County Chancery Court Docket No. E 87-3460 (1990 Decision)	2,300,000.00	15.00%	325,000.00	7,954.27

CASE	AMOUNT OF FUND OR BENEFIT	% FEE AWARD	FEE AMOUNT	COST AMOUNT
Hall v. Pulaski County Pulaski County Chancery Court Docket No. 86-212 (1986 Decision)	80,745.44	15.00%	12,111.62	Unknown
Powell v. Henry Pulaski County Chancery Court Docket No. E 76-3528 (1980 Decision)	639,226.24	15.00%	95,884.31	Unknown
Nelson v. Daniels Pulaski County Chancery Court Docket No. 90-528 (1991 Decision)	554,934.92	10.00%******	55,493.49	Unknown
Ragan v. Venhaus Pulaski County Chancery Court Docket No. 82-4503 (1986 Decision)	8,400,000.00	10.00%	847,691.00	5,452.10

Chaffin v. Arkansas Game & Fish Commission Pulaski County Chancery Court Docket No. 87-2010 (1988 Decision)	3,000,000.00	4.20%	125,000.00	Unknown

- This percentage is expressed as a percentage of the common benefit/common fund only. There was also evidently a substantial amount of common benefit with respect to bond cancellation. If the common benefit were factored in to determine the percentage of attorney's fees as a percentage of common fund and common benefit, the resulting percentage would be approximately 20% to 25%.

** United States District Court, Fort Smith Division

*** Court awarded fees in the amount of 1/3 of both the common fund and common benefit

**** The court awarded 25% of common fund of $25,000,000.00 as fees and then approved a number of additional billings at hourly rates for fees and costs involved in refund process administration.

***** Original judgment of $1.2 million with 25% attorney's fee. Attorney's fee abated by Arkansas Supreme Court due to conflict of interest. On remand, attorney's fee of $47,500.00, plus costs, plus approximately $70,000.00.

****** Plus 30% of actual refunds

Collins Kilgore
Chancery and Probate Judge
Second Division
Sixth Judicial Court

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RE: Lake View, et al. v. Huckabee, et al.
Pulaski County Chancery Court Numb4r 92-5318

Dear Counsel:

I have studied the Supreme Court's opinion in the *Lake View* case. In our telephone conference earlier this week, Mr. Brooks suggested that the Supreme Court opinion precluded any settlement in this case. However, that is not my interpretation.

The Court noted that this case "cries out for resolution," and I agree. The Court implies that it would benefit the state and the school children of this state to resolve this matter as quickly as possible. I understand the Court's opinion that without a hearing and analysis by this Court, it is "loathe" to declare that the new funding formula in place has resolved all the faults pointed out by the 1994 Order, thus barring any future litigation. Similar reason prevented my signed the Agreed Order.

However, I believe an agreement could be reached among the parties that would be acceptable. The quickest way to resolution is settlement. In order to comply with Arkansas Rule of Civil procedure 23, dismissal or settlement of a class action must be approved by the court. The clear inference of the approval requirement is that the court analyze any dismissal or compromise to insure fairness to the parties. Therefore, I very much encourage the parties to consider settling this case.

It appears that the Supreme Court considers the record on attorneys' fees closed, and I agree. I agree with the two justices who suggest the lodestar method would be the preferable method to determining the fee award. The state must pay the fee and the taxpayers, who ultimately bear the burden, should be able to see the correlation between the time spent and the fee awarded. However, the record is more than adequate to award a fee based on the economic benefit which inures to the poorer school districts and the whole state. This benefit is a result of the efforts of the class representative and its counsel. I am therefore preparing a decision and opinion on the award of attorney's fees to Plaintiff.

Very truly yours,

/S/
Collins Kilgore

cc: file number 92-5318
Mr. David Matthews
Mr. Samuel Jones, III
Mr. Christopher Heller
Mr. Stephen Jones
Mr. William Brazil
Mr. Donn Mixon
Mr. Malcolm Bobo
Mr. Edwin Alford
Mr. David Wilson